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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOHN HENRY KNAPP, Arizona State Prison Inmate No. 33659, and all inmates of the Arizona State Prison similarly situated,

Petitioners,

v.

HAROLD CARDWELL, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Have the courts below improperly refused to follow state law in interpreting the Arizona death penalty statute for the purpose of determining its constitutionality?

2. Is the Arizona death penalty statute as applied by the Arizona Supreme Court unconstitutional?

3. Is it a violation of the federal double jeopardy clause for the court, in a death penalty resentencing proceeding, to find "aggravating circumstances" that were expressly found not to exist at the first sentencing proceeding?

PARTIES INVOLVED*

The petitioners are James Alan Arnett, Manuel Thomas Lujan, Ronald Paul Bishop, Ronald Lee Madsen, Mitchell Thomas Blazak, Luis Mata, Richard B. Britson, Stevenson L. McDaniel, Robert Paul Brookover, Loris Lee McVay, Paris Hoyt Carriger, Ruben Melendez, Jose Jesus Ceja, Joe Morales, James Dean Clark, Willie Lee Richmond, Max Anderson Dunlap, James Albert Robison, Larry Eugene Evans, Joe Clarence Smith, Randy Greenawalt, Sylvester Smith, Jr., Douglas Edward Gretzler, Willie Luther Steelman, Wilmer G. Holsinger, Raymond Tison, Jimmie Wayne Jeffers, Ricky Tison, Paul William Jordan, Frank James Valencia, John Henry Knapp, Robert Wayne Vickers, Mark Allen Koch, Spencer Watson and all similarly situated inmates of the Arizona State Prison.

The respondents are Harold Cardwell, warden of the Arizona State Prison, and Robert K. Corbin, attorney general for the State of Arizona.

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*The petitioners listed individually were members of the class when the appeal from the district court's decision was filed. Because of the nature of the class, however, membership changes from time to time (because of deaths, successful appeals, new convictions, etc.).

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No.

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Petitioners,

v.

HAROLD CARDWELL, *et al.*,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, John Henry Knapp and all similarly situated inmates of the Arizona State Prison, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 19, 1982.[1]

[1] Counsel who participated as direct counsel in the class action have included principally the Public Defender offices of both Tucson and Phoenix. Amicus counsel for the NAACP Legal Defense Fund, and for the American Civil Liberties Union, have been permitted by the courts below to participate throughout directly, and have been involved in all arguments. In the interests of simplicity, we consolidate in this petition the positions of both the directly representative counsel and the amici.

OPINIONS BELOW

Knapp v. Cardwell, 667 F.2d 1253 (9th Cir. 1982) (see Appendix A).

Knapp v. Cardwell, 513 F. Supp. 4 (D. Ariz. 1980) (see Appendix B).

State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied*, 440 U.S. 924 (1979) (see Appendix C).

JURISDICTION

This is a class action, brought in the district court under 28 U.S.C. § 2254, by 34 persons facing execution on Arizona's death row. On April 18, 1980, the district court denied the relief requested. On January 19, 1982, the Ninth Circuit Court of Appeals affirmed. A timely petition for rehearing was denied on June 28, 1982, and this petition for certiorari was filed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. art. 1 § 10 (see Appendix D).

U.S. Const. amend. V (see Appendix E).

U.S. Const. amend. VIII (see Appendix F).

U.S. Const. amend. XIV § 1 (see Appendix G).

Ariz. Rev. Stat. § 13-453 (see Appendix H).

Ariz. Rev. Stat. § 13-454 (see Appendix I).

Ariz. Rev. Stat. § 13-703 (see Appendix J).

1973 Ariz. Sess. Laws ch. 138 § 10 (see Appendix K).

STATEMENT OF THE CASE

We enumerate the key facts:

1. In 1973, the Arizona legislature adopted a death sentence scheme, Arizona Revised Statutes §§ 13-453 and 454, that restricted the mitigating factors that might be considered when imposing the

death sentence. An earlier version of the proposed statute that provided for unrestricted consideration of mitigating factors was rejected. Journal of the Arizona House, Thirty First Legislature, First Regular Session, p. 499.

2. On December 20, 1976, in *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976), *cert. denied*, 433 U.S. 915 (1977), the Arizona Supreme Court held that no other mitigating factors could be considered by the sentencing court. *Id.* at 195, 560 P.2d at 50.

3. On April 21, 1978, in *Richmond v. Cardwell*, 450 F. Supp. 519 (D. Ariz. 1978), the district court found the statute unconstitutional for "failing to allow for a consideration of relevant mitigating factors of an individual's character by the sentencing court." *Id.* at 526.

4. On July 3, 1978, this Court decided *Lockett v. Ohio*, 438 U.S. 586 (1978), and remanded an Arizona death case for further proceedings in light of *Lockett*. *Jordan v. Arizona*, 438 U.S. 911 (1978).

5. On July 20, 1978, in *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied*, 440 U.S. 924 (1979), the Arizona Supreme Court, relying on *Lockett*, declared Arizona Revised Statutes § 13-454(F) unconstitutional because it restricted the mitigating factors the sentencing court could consider. 120 Ariz. at 444–45, 586 P.2d at 1256–57. The court thereafter stated, "The next question then is whether the constitutional and unconstitutional portions of A.R.S. §§ 13-453 and 454 are severable so that the constitutional portion of the statute can remain in force and effect." 120 Ariz. at 445, 586 P.2d at 1257. Finding that if the legislature had been aware that the limitation on mitigating factors was unconstitutional, it "would have enacted the remainder of the statute without what is now the offending portion," the court held that "the statute with the portion deleted remains in force and effect." *Id.*

6. On November 9, 1978, the Arizona Supreme Court denied a motion for rehearing and issued a supplemental opinion, directed in part to the "SEVERABILITY OF THE STATUTE." *Id.* at 452, 586 P.2d at 1264 (emphasis in original). The court rejected the defendant's contention that "A.R.S. § 13-454, cannot be *severed*," holding, "[t]he statute, *as severed*, is valid." 120 Ariz. at 452–53, 586 P.2d at 1264–65 (emphasis added). As a result of *Watson*, all

persons previously sentenced to death were allowed to be resentenced to death under the statute as severed. *State v. Ceja*, 126 Ariz. 35, 36, 612 P.2d 491, 492 (1980).[2]

7. The judicially reconstructed death penalty statute was challenged in federal district court. On April 18, 1980, the district court concluded that while the *Watson* court may have thought it "severed" the unconstitutional portion of the statute, it had not really done so. *Knapp v. Cardwell*, 513 F. Supp. 4, 9 (D. Ariz. 1980). The district court found that instead the *Watson* court had merely reinterpreted the death penalty statute by overruling *Richmond*. *Id.* at 10–11. The district court then upheld the death penalty statute, as "reinterpreted."

8. The Ninth Circuit Court of Appeals affirmed. *Knapp v. Cardwell*, 667 F.2d 1253 (9th Cir. 1982). The court found the Arizona Supreme Court's "use of the word 'severance' . . . troublesome," but nonetheless agreed that the *Watson* court had overruled *Richmond* and reinterpreted the death penalty statute. *Id.* at 1259.

Judge Adams dissented in part because the *Watson* resentencing procedures "permit the new sentence to rest on findings of aggravating circumstances that were found, in the first sentencing proceeding, not to be present in the crime." *Id.* at 1265. Judge Adams stated that such new findings were "impermissible," *id.*, "[u]nder the standards set out in" this Court's decision in *Bullington v. Missouri*, 451 U.S. 430 (1981). 667 F.2d at 1269.

9. A petition for rehearing was timely filed and denied. This petition followed.

REASONS FOR GRANTING THE WRIT

1. The question is important. Because death cases are different, "this Court has gone to extraordinary measures to ensure that the

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[2] On May 1, 1979, a new death penalty statute, Arizona Revised Statutes § 13–703 (West Supp. 1981–82), directing the sentencing court to consider all mitigating factors, became effective. That statute is not challenged here.

prisoner sentenced to be executed is afforded" full protection of all constitutional guarantees. *Eddings v. Oklahoma*, 102 S. Ct. 869, 878 (1982) (O'Connor, J., concurring). *See also Gardner v. Florida*, 430 U.S. 349, 357–58 (1977) (plurality opinion); *id.*, at 363–64 (White, J., concurring). This case is uniquely different because not just one, but dozens of lives stand immediately at stake, abiding only the ruling of this Court. The sheer magnitude of the case warrants review by this Court.

2. The decisions below conflict with this Court's repeated holdings that "state courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975); *see also Wainwright v. Stone*, 414 U.S. 21, 22–23 (1973), and cases cited; *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965), and cases cited; *Winters v. New York*, 333 U.S. 507, 514 (1948).

The problem is this: Arizona Revised Statutes § 13–454(F) listed a series of mitigating factors to be considered when imposing the death sentence. In *State v. Richmond*, 114 Ariz. 186, 195, 560 P.2d 41, 50 (1976), *cert. denied*, 433 U.S. 915 (1977), the Arizona Supreme Court held that these factors were exclusive. In *Lockett*, this Court held that there could be no such restriction, and, therefore, in *State v. Watson*, 120 Ariz. 441, 444–45, 586 P.2d 1253, 1256–57 (1978), *cert. denied*, 440 U.S. 924 (1979), the Arizona Supreme Court declared subsection (F) unconstitutional. The *Watson* court declared this section "severable" and proceeded to promulgate a new subsection (F) of the court's own making, rewriting the statute in an attempt to conform to *Lockett*. *Id.* at 445, 586 P.2d at 1257.

In the district court, the petitioners contended that the Arizona Supreme Court's severance of subsection (F) left the remainder of the statute void for vagueness and independently violated the basic eighth amendment prohibition of "severe punishments not legally authorized and not within the jurisdiction of the courts to impose." *Furman v. Georgia*, 408 U.S. 238, 376 (1972) (Burger, C. J., dissenting). Petitioners noted that the Arizona Supreme Court could not cure the *Lockett* problem by indulging in a vice more fundamentally in conflict with the eighth amendment: the judicial legislation of "illegal punishments." *Id.*

It is well established that "[f]ixing the punishment for crimes is a legislative, rather than a judicial function." *United States v.*

Cleveland, 503 F.2d 1067, 1071 (9th Cir. 1974). To be sure, the Constitution contains no strict requirement of separation-of-powers within *state* governments. But where vital Bill of Rights guarantees are jeopardized through judicial improvisation, which deprives lawmaking of both regularity and the restraint that public responsibility imposes on legislation, the result violates the Constitution. *See Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Whalen v. United States*, 445 U.S. 684, 689–90 n.4 (1980); *Ashton v. Kentucky*, 384 U.S. 195 (1966).

As this Court has repeatedly recognized, regularity and legislative responsibility have particular significance where the punishment imposed is death. This Court has upheld only those death penalty schemes in which the sentencing determination is "circumscribed by the legislative guidelines." *Gregg v. Georgia*, 428 U.S. 153, 207 (1976). This Court also has emphasized that "legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency," *Woodson v. North Carolina*, 428 U.S. 280, 294–95 (1976), which in turn are "[c]entral to the application of the [Eighth] Amendment." *Id.* at 288. *Cf. Enmund v. Florida*, 102 S. Ct. 3368, 3374 (1982) (imposition of death penalty upon the petitioner inconsistent with eighth and fourteenth amendments because, *inter alia*, "current legislative judgment . . . weighs on the side of rejecting capital punishment for the crime at issue").

The Arizona Supreme Court's assumption that the Arizona State Legislature would have wanted a constitutional statute provides no basis for creating an exception to the principles stated above. As this Court noted in *United States v. Jackson*, 390 U.S. 570, 580–81 (1968):

> It is one thing to fill a minor gap in a statute—to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality. . . . The Government . . . asks us to extend the capital punishment provision of the Federal Kidnaping Act in a new and uncharted direction, without

> the compulsion of a legislative mandate and without the benefit of legislative guidance. That we decline to do.

The Court concluded this portion of its analysis stating: "The capital punishment provision of the Federal Kidnaping Act cannot be saved by judicial reconstruction." *Id.* at 585.

Similarly, most state supreme courts properly have refused prosecutors' invitations to "rewrite" death penalty statutes to avoid constitutional infirmity because they "are matters of legislative concern." *Rockwell v. Superior Court*, 18 Cal. 3d 420, 445, 556 P.2d 1101, 1116, 134 Cal. Rptr. 650, 665, (1976). *Accord, State v. Lindquist*, 99 Idaho 766, 589 P.2d 101, 105 (1979); *French v. State*, 266 Ind. 276, 362 N.E.2d 834, 838 (1977); *Bond v. State*, 403 N.E.2d 812, 815–16, (Ind. 1980); *State v. Cline*, 397 A.2d 1309, 1311 (R. I. 1979); *Kennedy v. State*, 559 P.2d 1014, 1016–17 (Wyo. 1977). As stated by this Court in *United States v. Jackson*, 390 U.S. at 579 n.17:

> [C]ourts confronted with ["the complex problems presented by separate penalty proceedings" in capital cases] have concluded that their solution requires "comprehensive legislative and not piecemeal judicial action."

The courts below did not dispute that if in fact the Arizona Supreme Court had created a severance followed by judicial substitution, the resulting death penalty scheme would be invalid. They simply avoided this question by holding that there had been no severance, but rather an overruling of *Richmond* or a "reinterpretation" of the statute. This is in the teeth not merely of *Watson* itself but of Arizona law both generally and specifically.

The Arizona Supreme Court does not "reinterpret" prior court decisions to suit its own purposes. In *Demand v. Gordon*, 106 Ariz. 475, 478 P.2d 99 (1970), the Arizona Supreme Court held that court decisions must be strictly interpreted according to the language of the decisions themselves. In reviewing an opinion of the Arizona Court of Appeals, the Supreme Court stated:

> Our task is to determine what the *opinion* actually said as determined by *its* language, not what the Court of Appeals intended to say, or meant, or by subsequent

> order says that it meant. Our decision, therefore, must come from the opinion and not from the subsequent order.

106 Ariz. at 477, 478 P.2d at 101 (emphasis in original).

Furthermore, in at least ten decisions after *Watson*, the Arizona Supreme Court has in fact reaffirmed its prior decision that subsection (F), the mitigating factor section, was unconstitutional as written and that it severed this offending portion of the statute. The court's decisions in *State v. Arnett*, 125 Ariz. 201, 608 P.2d 778 (1980), and *State v. Smith*, 123 Ariz. 231, 599 P.2d 187 (1979), are representative.

In *State v. Arnett*, the court stated:

> Following *Lockett and Bell*, [*v. Ohio*, 438 U.S. 637 (1978)] supra, this court, in the case of *State v. Watson*, [citation omitted] *severed* that portion of the sentencing procedure which was constitutionally infirm and directed that in the future courts in the State of Arizona must consider any mitigating factor presented by the defendant before the imposition of the death penalty.

125 Ariz. at 202, 608 P.2d at 779 (emphasis added). Similarly, in *State v. Smith*, the court said:

> In July 1978, this Court held A.R.S. § 12-454(F), part of Arizona's death penalty statute, unconstitutional, because it limited a defendant's right to show mitigating circumstances. *State v. Watson*, [citation omitted]. We then went on to find this constitutionally infirm section of the statute *severable* and upheld the remaining portion of the statute.

123 Ariz. at 243, 599 P.2d at 199 (emphasis added). *See also State v. Tison*, 129 Ariz. 526, 541, 633 P.2d 335, 350 (1981) (rejecting contention that *Watson* "is unconstitutional because the mitigation provisions of the statute are not severable from the remainder of the statute"); *State v. Greenawalt*, 128 Ariz. 150, 174, 624 P.2d 828, 852, *cert. denied*, 102 S. Ct. 364 (1981) ("We have considered before appellant's claim that the death penalty statute was not sev-

erable and held otherwise."); [3] *State v. Jordan*, 126 Ariz. 283, 286, 614 P.2d 825, 828, *cert. denied*, 449 U.S. 986 (1980) (rejecting contention that "*Watson* incorrectly decided that the unconstitutional parts of Arizona's death penalty procedure were severable from the remainder"); *State v. Carriger*, 123 Ariz. 335, 340, 599 P.2d 788, 793 (1979), *cert. denied*, 444 U.S. 1049 (1980) ("In *State v. Watson*, [citation omitted] we recognized the continuing constitutionality of A.R.S. § 13-454, holding only subsection (F) unconstitutional. We find *Watson* controlling.").

Since the decision of the court below does not follow these Arizona decisions, it is in conflict with the decisions of this Court requiring that it do so.

3. In the alternative, petitioners argued that the imposition of the death penalty upon any of the class members was in violation of the double jeopardy and ex post facto clauses of the Constitution. As a matter of constitutional law, common law, and statutory law, once the Arizona statute was declared unconstitutional the sentences of the class members automatically became life imprisonment. *People v. Hardy*, 76 Cal. App. 3d 441, 142 Cal. Rptr. 887, 890–91 (1978); 1973 Ariz. Sess. Laws ch. 138 § 10. The petitioners' "cases had progressed sufficiently far in the legal process as to be governed solely by the old statute, with the concomitant unconstitutionality of its death penalty provision." *Dobbert v. Florida*, 432 U.S. 282, 301 (1977). Their sentences could not then be aggravated by sentencing them to death without violating the double jeopardy clause.

A separate and distinct double jeopardy violation arises out of the fact that no member of the class was a party to the litigation which vacated their death sentences. As a result of *Watson*, the death penalty of each class member was vacated by *sua sponte* order of the Arizona Supreme Court and over the direct objection of

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[3] In addition to *Watson*, *State v. Jordan*, and *Arnett*, *supra*, the court cited as authority for this statement its decisions in *State v. Clark*, 126 Ariz. 428, 616 P.2d 888, *cert. denied*, 449 U.S. 1067 (1980), *State v. Steelman*, 126 Ariz. 19, 612 P.2d 475, *cert. denied*, 449 U.S. 913 (1980), *State v. Mata*, 125 Ariz. 233, 609 P.2d 48, *cert. denied*, 449 U.S. 938 (1980), and *State v. Evans*, 124 Ariz. 526, 606 P.2d 16, *cert. denied*, 449 U.S. 891 (1980).

several members of the class. *See State v. Ceja*, 126 Ariz. 35, 36, 612 P.2d 491, 492 (1980). The resentencing process proceeded only because the Arizona Supreme Court had by general order directed it, not because any of the class members had sought or invited that result.

We are thus dealing with the classic case of precisely what double jeopardy is intended to prevent: the state missing on the first swing and then, wholly on its own motion, taking a second swipe at the same defendant. As was stated in *Swisher v. Brady*, 438 U.S. 204 (1978), the double jeopardy protection means that one fair shot is enough. The state is forbidden a " 'second crack.' " *Id* at 215–16. The resentencing process is unconstitutional on this ground apart from any other consideration.

Additionally, sentencing to death those petitioners who were tried and sentenced prior to *Watson* violates the ex post facto clause of the Constitution. The Ninth Circuit Court of Appeals' reliance upon this Court's decision in *Dobbert* to reject this claim ignored the "critical" distinction made in *Dobbert* between capital defendants who had never been subjected to the old, unconstitutional law and those (as here) who were convicted and condemned under it, and then exposed to death again under a subsequent ex post facto regime. As such, the Ninth Circuit's decision is in conflict with

> the bulk of the lower court case law and the better-reasoned constitutional and common law analysis . . . that when a statute is invalidated on *Lockett* grounds, defendants tried and sentenced under the former, unconstitutional standard cannot be resentenced to death and can receive a maximum punishment of life imprisonment.

Hertz, Weisberg, *In Mitigation of the Penalty of Death:* Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 Colum. L. Rev. 317, 364 (1981). *See, e.g., Commonwealth v. Story*, _____Pa. _____, 440 A.2d 488, 491 (1982) (quoting and distinguishing *Dobbert*, 432 U.S. at 301).

4. As Judge Adam's dissent demonstrates, the Ninth Circuit decision also conflicts with *Bullington v. Missouri*, 451 U.S. 430 (1981).

Petitioners were originally sentenced under the 1973 death penalty statute, which required the sentencing court to "return a special verdict setting forth its findings as to the existence or non-existence" of each of the statutorily specified aggravating circumstances. Ariz. Rev. Stat. § 13-454(C). Since the original sentences were invalid, all class members were resentenced as a result of *Watson*. The precise question presented is whether upon resentencing the sentencing court may constitutionally be allowed to find, and base a death sentence on, aggravating circumstances that the sentencer previously found did not exist. The majority opinion said yes. Judge Adams said no.

Judge Adams used the case of Jordan, a class member, as an example. When Jordan was originally sentenced, the only aggravating circumstances proved were based upon his prior convictions.[4] Upon resentencing, Jordan presented new evidence of mitigation. The state presented no new evidence.[5] Nevertheless, the same judge who presided at the original sentencing found two additional aggravating circumstances: namely, that the offense had been "heinous" and "for pecuniary gain." Thus the state was allowed to prove on resentencing what it had expressly failed to prove on the "first crack."

This result conflicts directly with *Bullington*. In *Bullington*, this Court extended double jeopardy protection to capital sentencing proceedings such as those conducted in Missouri and Arizona. In analyzing the Missouri sentencing proceedings, the Court expressed its agreement with the dissent in the court below that

> the sentence of life imprisonment which petitioner re-

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[4] The special verdict for the original sentencing is attached hereto as Appendix L.

[5] The special verdict for the resentencing is attached hereto as Appendix M. Unlike the Federal courts here, the state trial court had no trouble "recogniz[ing] that . . . *State v. Watson*, . . . has held A.R.S. Section 13-454(f) unconstitutional . . . . This Court also recognizes, however, that the Court in *Watson* also held the unconstitutional portion of the statute to be severable . . . ." Appendix M at page 99a.

> ceived at his first trial meant that "the jury has already acquitted the defendant of whatever was necessary to impose the death sentence."

451 U.S. at 445.

As noted by Judge Adams, "the Arizona death sentencing scheme is quite similar to the Missouri procedure in the respects emphasized in *Bullington*." 667 F.2d at 1267 n.3. Under both Missouri's and Arizona's death penalty schemes, a separate, adversarial hearing determines the defendant's sentence. Under both systems, the prosecutor has the burden of proving beyond a reasonable doubt the existence of certain aggravating circumstances. *Id. Bullington* held that a prosecutor who fails to prove an aggravating circumstance initially may not be given a second chance.

Although these petitioners were initially sentenced to death, the *Bullington* rationale is equally applicable, if not more so. *Id.* Petitioners' death sentences rested upon the specific aggravating circumstances then proved. They were, by statute and in fact, explicitly acquitted of any aggravating circumstances not found by the sentencing court. For that reason, the *Bullington* rationale precludes the state from seeking to prove additional aggravating circumstances upon resentencing.

For the reasons set forth by Judge Adams, the case at a minimum should be remanded to determine whether, and in which cases, these Arizona procedures violated the double jeopardy clause.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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September, 1982.

APPENDIX A:

KNAPP v. CARDWELL,

667 F.2d 1253 (9th Cir. 1982).

Appendix A

United States Court of Appeals

NINTH CIRCUIT

No. 80-54[illegible].

JOHN HENRY KNAPP,
Arizona State Prison Inmate No. 33659, and all inmates of the Arizona State Prison similarly situated, Petitioners-Appellants,

v.

HAROLD CARDWELL, et al.,
Respondents-Appellees.

Argued and Submitted June 8, 1981.

Decided Jan. 19, 1982.

John Foreman, Deputy Public Defender, Phoenix, Ariz., for Ceja, Knapp.

Donald S. Klein, Tucson, Ariz., for Ortiz, Jeffers.

Allen G. Minker, Tucson, Ariz., for Richmond, Blazak.

Robert C. Brown, Casa Grande, Arizona., for Greenawalt.

Robert B. Norgren, Tucson, Ariz., for Steelman.

John P. Frank, Phoenix, Ariz., argued; NAACP Legal Defense Fund, etc. Michael Cooper, Jose A. Cardenas, Phoenix, Ariz., on brief, for amicus curiae.

William J. Schaffer, III, Chief Counsel, Asst. Atty. Gen., Phoenix, Ariz., for respondents-appellees.

Appeal from the United States District Court for the District of Arizona.

Before MERRILL, ADAMS*, and SNEED, Circuit Judges.

SNEED, Circuit Judge:

Appellants are a class of Arizona prisoners sentenced to death. They attack their death sentences on the ground that the Arizona law under which they were sentenced, as interpreted by the Arizona Supreme Court, is unconstitutional. They further claim that even if it is constitutional, its application to them violates the ex post facto and double jeopardy clauses of the Constitution, and that their constitutional rights to speedy sentences were violated. The district court rejected these contentions and upheld the death sentences. We affirm.

I. FACTS AND BACKGROUND

In 1973 the Arizona legislature adopted alternative penalties for first degree murder of death or life imprisonment without possibility of parole for 25 years. Ariz.Rev.Stat. § 13-454 (1978) (current version at Ariz.Rev.Stat. § 13-703). The enactment required the judge to hold a presentence hearing at which he would hear evidence of aggravating and mitigating circumstances. After considering the evidence presented at the presentence hearing, and weighing it together with evidence relevant to aggravation or mitigation introduced at trial, the judge was required to make a finding as to the existence or non-existence of each aggravating and mitigating circumstance listed in the statute. In order to impose the death penalty, the judge was required to find the existence of one or more of the aggravating circumstances listed in the statute and "that there are no mitigating circumstances sufficiently substantial to call for leniency." Ariz.Rev.Stat. § 13-454(D) (1978) (current version at Ariz.Rev.Stat. § 13-703(E)).

In upholding section 13-454 against a challenge for vagueness, the Arizona Supreme Court in 1976 interpreted the list of mitigating factors in that section to be exclusive. *State v. Richmond*, 114 Ariz.

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*Honorable Arlin M. Adams, United States Circuit Judge for the Third Circuit, sitting by designation.

186, 560 P.2d 41 (1976), *cert. denied*, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977). This restrictive interpretation was reaffirmed on March 1, 1978, in *State v. Bishop*, 118 Ariz. 263, 576 P.2d 122 (1978), *sentence vacated sub nom. Bishop v. Arizona*, 439 U.S. 810, 99 S.Ct. 69, 58 L.Ed.2d 103 (1978) (death sentence vacated and remanded for reconsideration in light of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)), *sentence reinstated, State v. Bishop*, 127 Ariz. 531, 622 P.2d 478 (1980).

On April 21, 1978, two death-row inmates petitioned the district court for writs of habeas corpus, alleging the unconstitutionality of section 13-454 as interpreted in *State v. Richmond* and *State v. Bishop*. The district court enjoined the state from putting the two petitioners to death, concluding that the failure of section 13-454, as interpreted, to permit consideration of all relevant mitigating circumstances violated petitioners' rights under the Eighth and Fourteenth Amendments of the United States Constitution. *Richmond v. Cardwell*, 450 F.Supp. 519 (D.Ariz.1978).

On May 2, 1978, the Arizona Supreme Court directed the execution of John Henry Knapp. Knapp immediately instituted the present action in district court, alleging that the court's reasoning in *Richmond v. Cardwell* was applicable to all inmates on Arizona's death row. The district court, on May 12, 1978, enjoined the state from imposing the death penalty on any state prisoners. On July 3, 1978, the United States Supreme Court found an Ohio death penalty statute unconstitutional because it limited consideration of mitigating factors to those enumerated in the statute and thereby potentially excluded consideration of relevant mitigating factors. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *see also Bell v. Ohio*, 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1978).

The Arizona Supreme Court reacted to the *Lockett* decision by deciding in *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied*, 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979), that section 13-454 was unconstitutional insofar as it limited the right of the defendant to show additional mitigating circumstances. 120 Ariz. at 445, 586 P.2d at 1257. The *Watson* court then reasoned that the offending portion was "severable" and could be "deleted," and proceeded to do so, stating that if the state legislature had been aware of the constitutional problems, it would have permitted con-

sideration of all mitigating factors.[1] The result of *Watson* was to change the Arizona procedure for imposing the death penalty to require that the judge hear and consider evidence relevant to *any* mitigating circumstances and otherwise to leave the procedure intact.

On May 1, 1979, the Arizona legislature adopted the present version of Ariz.Rev.Stat. § 13-703 which, in essence, codified the result reached in *Watson*.[2]

II. DISTRICT COURT DECISION

In July 1979 the district court in this case ordered that there be no executions in Arizona until the state moved to dissolve the May 12, 1978, injunction barring executions. The state made such a motion on January 9, 1980, on the basis that the inmates had been or would be sentenced under a procedure that permits consideration of all mitigating circumstances. The district court, on April 18, 1980, vacated its original injunction and then reimposed a stay of all executions pending appeal to this court. *Knapp v. Cardwell*, 513 F.Supp. 4 (D.Ariz.1980). In a thorough and well-reasoned opinion, the court held that the post-*Watson* version of section 13-454 was neither void for vagueness nor violative of the Eighth and Fourteenth Amendments. The court also noted its limited power to review state court interpretations of state statutes, and held that in any event the Arizona Supreme Court's interpretation of the statute in *Watson* was reasonable. The district court went on to reject the prisoners' claims that the application of *Watson* to them violated the double jeopardy and ex post facto clauses of the Constitution, and held that it was not appropriate to consider the prisoners' claims of violation of their

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[1]The court remanded the case for resentencing. In a supplemental opinion denying a petition for rehearing, the court held that the remand did not violate the double jeopardy or ex post facto clauses of the United States and Arizona Constitutions. *State v. Watson*, 120 Ariz. at 451–54, 586 P.2d at 1263–66 (1978). The Arizona Supreme Court later set Watson's death sentence aside, partly based on mitigating circumstances that developed after his prior death sentence was rendered. *State v. Watson*, 129 Ariz. 60, 628 P.2d 943 (1981).

[2]Neither the validity of section 13-703, nor the sentences of those sentenced pursuant to it, is at issue in this case.

right to speedy sentencing in a class action. We agree with the district court.

III. ISSUES ON APPEAL

Appellants[3] vigorously attack the decision of the district court. They assert both that the result in *State v. Watson* renders section 13-454 void for vagueness, and that the procedure used by the court to reach its result usurped the powers of the Arizona Legislature and thus violated the Fourteenth Amendment and the guarantee clause of the United States Constitution. They next urge that even if the *Watson* court reached a permissible result, its application to them violates the double jeopardy and ex post facto clauses of the Con-

CATEGORIES OF APPELLANTS

Category	Number of Appellants	TIME				
		(Before 4/21/78)	4/21/78 Richmond v. Cardwell	7/13/78 Lockett v. Ohio	7/20/78 State v. Watson (Watson II)	5/1/79 Amendment to Ariz. Rev. Stat. § 13-703
1	6	c-t-s			rs	
2	7	c-t-s				rs
3	1	c-t-s			rs	(rs2)
4	3	c-t-s				(rs)
5	2	c	t		s	
6	1	c			t-s	
7	1				c-t-s	
8	1	c				t-s
9	3				c	t-s
10	2	c-t-s				(rt)
11	1	c-t-s			rs	(rt)
12	2	c			t-s	(rt)

c = crime
t = trial
s = sentence
rs = resentence (first sentence vacated)
rs2 = second resentence (first resentence vacated)
rt = retrial (conviction and sentence vacated)
() = pending at time appeal was filed

[3] The class of appellants as of the time of filing this appeal appeared to fall into twelve categories in terms of the timing of the various events surrounding their death sentences.

stitution. Finally, they continue to insist that delays in imposing sentence on them have violated their Sixth Amendment right to speedy sentencing. We shall address each of these issues.

IV. THE VAGUENESS ISSUE

The Arizona Supreme Court in *Watson* maintained that it was "severing" the unconstitutional from the constitutional portions of Ariz.Rev.Stat. § 13-454. *State v. Watson*, 120 Ariz. at 445, 586 P.2d at 1257. Appellant prisoners argue that by claiming to have effected a severance, the *Watson* court must have deleted all of subsection F, the subsection that lists the mitigating factors. It follows, they argue, that the remainder of the statute is left with meaningless internal references to a non-existent subsection F and thus is void for vagueness. Alternatively, appellants contend that the deletion of subsection F leaves the statute without any authorization for consideration of mitigating factors, with the consequence that it violates the Eighth and Fourteenth Amendments.

The district court held that *Watson* merely reinterpreted section 13-454 to allow consideration of any mitigating factors, and did not "sever" any particular language. *Knapp v. Cardwell*, 513 F.Supp. at 11. While the use of the word "severance" is troublesome, the unmistakable effect of the *Watson* decision as a whole is to reinterpret the statute to allow any mitigating factor to be considered.

The intent of the *Watson* court is clear. The court did not state that subsection F in its entirety was unconstitutional. It merely invalidated a prior interpretation of that provision "*insofar as it limits* the right of the defendant to show additional circumstances." *State v. Watson*, 120 Ariz. at 445, 586 P.2d at 1257 (emphasis added). The failure of the court explicitly to overrule *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976), *cert. denied*, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977), the case in which the Arizona Supreme Court held the list of mitigating factors to be exclusive, is not determinative. The intent and effect of the *Watson* decision are clear.

We agree with the district court that the substance of *Watson* was merely the elimination of the restriction on cognizable mitigating circumstances engrafted onto the statute by *State v. Rich-*

mond. This constitutes a reinterpretation, and it has long been within the prerogative of the highest state court to interpret, or reinterpret, state statutes. *See Wainwright v. Stone*, 414 U.S. 21, 94 S.Ct. 190, 38 L.Ed.2d 179 (1973); *Garner v. Louisiana*, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961); *Smiley v. Kansas*, 196 U.S. 447, 455, 25 S.Ct. 289, 290, 49 L.Ed. 546 (1905).

That the Arizona Supreme Court did not intend to delete the entire subsection F from the statute is further supported by its opinions written after *Watson* wherein the court specifically cites to subsection F. *See State v. Jordan*, 126 Ariz. 283, 614 P.2d 825, *cert. denied*, 449 U.S. 986, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980); *State v. Steelman*, 126 Ariz. 19, 612 P.2d 475, *cert. denied*, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980); *State v. Brookover*, 124 Ariz. 38, 601 P.2d 1322 (1979). In the *Jordan* and *Steelman* cases, the court actually quoted language from subsection F.

Since we have found that subsection F was not deleted from Ariz.Rev.Stat. § 13-454 by the Arizona Supreme Court in *Watson*, we hold that the post-*Watson* version of the statute is not void for vagueness. We further hold that the post-*Watson* version of section 13-454 allows consideration of all mitigating factors and thus does not violate the Eighth and Fourteenth Amendments.

V. THE USURPATION ISSUE

Appellant prisoners argue that, even assuming the Arizona Supreme Court intended in *Watson* to accomplish what we have found they did, the effect of the decision constitutes judicial legislation to create criminal penalties in violation of the Fourteenth Amendment due process clause and the Article IV, section 4, guarantee of a republican form of government for the states. We do not agree.

To support their argument, appellants employ alternative approaches. They assert, first, that in light of the legislative history and wording of Ariz.Rev.Stat. § 13-454, there is no permissible way to interpret it to allow a court to consider all mitigating circumstances, and therefore only a legislative amendment could cure it. In the alternative, appellants posit that even if the Arizona Supreme Court could have reached its interpretation of section 13-454

by some permissible means, it instead attempted to achieve that end by a "severance," which in this case requires the addition of language to the statute, and that can be done only by the legislature. In either case, appellants claim that the Arizona Supreme Court's attempt in *Watson* to conform section 13-454 to constitutional requirements usurped the function of the state legislature and was thus invalid.

A. The State Court's Interpretation Is Not Within the Scope of Federal Review

Normally the construction of a state statute by the highest court of that state must be treated as if it had been incorporated into the words of the statute. *Poulos v. New Hampshire*, 345 U.S. 395, 402, 73 S.Ct. 760, 764, 97 L.Ed. 1105 (1953). State courts have the final authority to interpret and, where they see fit, to reinterpret that state's legislation. *Garner v. Louisiana*, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961). *See also, Wainwright v. Stone*, 414 U.S. 21, 22–23, 94 S.Ct. 190, 192–193, 38 L.Ed.2d 179 (1973); *N.A.A.C.P. v. Button*, 371 U.S. 415, 432 (1963); *Winters v. New York*, 333 U.S. 507, 514, 68 S.Ct. 665, 669, 92 L.Ed. 840 (1948).

The Supreme Court has established that courts should construe legislation in a constitutional manner "if fairly possible," *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973), and that state courts can use statutory interpretation to validate otherwise questionable death penalty statutes. *See Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); also see discussion in *Knapp v. Cardwell*, 513 F.Supp. at 11 n.12. Federal courts will not review a state supreme court's interpretation of its own statute unless that interpretation is clearly untenable and amounts to a subterfuge to avoid federal review of a deprivation by the state of rights guaranteed by the Constitution. *See Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11, 95 S.Ct. 1881, 1885 n.11, 44 L.Ed.2d 508 (1975); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129, 65 S.Ct. 1475, 1480, 89 L.Ed. 2092 (1945); *Ward v. Love County*, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751 (1920); *Terre Haute & I. R. Co. v. Indiana*, 194 U.S. 579, 24 S.Ct. 767, 48 L.Ed. 1124 (1904).

B. The Arizona Supreme Court's Interpretation of the Statute in Watson is not Untenable

Appellants argue that review is necessary and proper here because the Arizona Supreme Court's interpretation of section 13-454 is clearly incompatible with the language of section 13-454 and its legislative history.

We agree with the district court that the *Watson* construction of the statute is not untenable. *Knapp v. Cardwell*, 513 F.Supp. at 12–13. The only positive command of section 13-454(F) is that the court shall consider the mitigating factors listed there. Its language nowhere dictates that the court shall consider no other mitigating factors, nor does the language of subsection D preclude use of unlisted factors in deciding whether any mitigating circumstances are "sufficiently substantial to call for leniency." Ariz.Rev.Stat. § 13-454(D).[4] Moreover, the fact that a bill introduced in the House of Representatives of Arizona, containing an explicit provision for open mitigation, was defeated in favor of a Senate bill containing no such explicit language on open mitigation, does not compel a finding that the legislature intended the list of mitigating factors to be exclusive. See discussion in *Knapp v. Cardwell*, 513 F.Supp. at 12–13 n.15.

C. The Arizona Supreme Court in Watson was not Legislating

We agree with the district court that the Arizona Supreme Court in *Watson* was merely reinterpreting Ariz.Rev.Stat. § 13-454. Arizona law adjures that statutes should be construed to effect their objects, and that interpretations that imperil the constitutionality of statutes be avoided when reasonably possible. Ariz.Rev.Stat. §§ 1-

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[4]Both Texas and Florida had death penalty statutes that were unclear as to whether the listed mitigating circumstances were exclusive, and both statutes were upheld by the Supreme Court after the highest state courts had interpreted the ambiguity in favor of non-exclusivity. *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

211, *et. seq.*[5] The court in *Watson* was being guided by this precept. The language of the statute remained precisely what it had been since it was first enacted. If anything was "severed" by *Watson*, it was the gloss imparted to the statute (erroneously we now know) by *Richmond*. We see no difference between such a "severance" in correction of earlier judicial error and an overruling or reinterpretation.

We also agree with the district court that the *Watson* result was not precluded by the *Watson* court's refusal to repudiate *State v. Richmond*. See discussion in 513 F.Supp. at 13–14. No matter how the court may have characterized it, what it did in *Watson* was to undo what it had done earlier in *Richmond*.

Our conclusion regarding the *Watson* interpretation of section 13-454 means that the Arizona Supreme Court did not impose a penalty unauthorized by the legislature in violation of the Eighth and Fourteenth Amendments. At all relevant times, Arizona had on its books a statute that clearly authorized death as a punishment for the crimes each of the appellants committed. The United States Supreme Court's decision in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), which declared unconstitutional an Ohio death penalty statute that expressly limited the mitigating factors the sentencing court could consider, did not render the Arizona death penalty a nullity. It merely made sentences rendered under its then current construction unenforceable. *See In re Graham*, 138 U.S. 461, 11 S.Ct. 363, 34 L.Ed. 1051 (1891). This left it open to the Arizona Supreme Court to reinterpret section 13-454 to conform to the constitutional mandate or to adhere to its original interpretation and invoke the provision for a life sentence. *See Garner v. Louisiana*, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961). It chose to reinterpret section 13-454. The Constitution does

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[5]Quoted in footnote 16 of the opinion below. *Knapp v. Cardwell*, 513 F.Supp. at 13 n.16.

not preclude that choice. *See Smiley v. Kansas*, 196 U.S. 447, 455, 25 S.Ct. 289, 290. 49 L.Ed. 546 (1904).[6]

The choice made by the Arizona Supreme Court between competing interpretations of the statute was not a legislative act. Unlike legislative choice, the selection by a court between competing interpretations is circumscribed by legislative intent which, while not known precisely with respect to all possible issues, does eliminate a wide range of choices that would otherwise be available. Moreover, judicial choice can only exist as the result of a highly structured adversarial process instituted not by judges but by the adversaries themselves. And most importantly, the court's choice of competing interpretations, in the absence of constitutional constraints, can be overturned by the legislature. These differences justify our rejection of the charge of usurpation, and so it follows that we also must reject the related due process and guarantee clause arguments.[7]

VI. THE EX POST FACTO ISSUE

It has been said that the ex post facto clause prohibits:

> any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law *at the time when the act was committed* . . . .

Beazell v. Ohio, 269 U.S. 167, 169, 46 S.Ct. 68, 70 L.Ed. 216

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[6]Appellants do not complain of irregularities in the proceedings in the Arizona Court; they merely object to its choice of alternatives. *See Watermeier v. Louisiana Stadium and Exposition District*, 308 F.Supp. 273, 277–78 (E.D.La. 1969), *aff'd mem.*, 398 U.S. 955, 90 S.Ct. 2172, 26 L.Ed.2d 539 (1970). Further support for the rejection of appellants' argument is found in *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), where a similar claim under the ex post facto clause was rejected.

[7]In view of our conclusion that the Arizona Supreme Court was not legislating in *Watson*, we need not reach the question of whether the United States Constitution requires separation of powers in state government.

(1925) (emphasis added). Although the ex post facto prohibition, United States Constitution, art. I, § 10, cl. 1, literally applies only to legislative acts, the Supreme Court has incorporated the principle upon which the prohibition rests into the due process clauses of the Fifth and Fourteenth Amendments. *See Marks v. United States*, 430 U.S. 188, 191–92, 97 S.Ct. 990, 992–93, 51 L.Ed.2d 260 (1977); *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964).

The first of appellant's two ex post facto arguments is that, because section 13-454 as interpreted in *Richmond v. Cardwell*, 450 F.Supp. 519 (D.Ariz.1978) was unconstitutional (per *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)), Arizona had no death penalty prior to *Watson*. *Watson*, therefore, was a judicial enlargement of the punishment for appellants' crimes committed before that decision in violation of the ex post facto clause.

We agree with the district court that *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), requires rejection of this argument. Dobbert committed his crime when Florida had an applicable death penalty statute of a type later declared unconstitutional in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Prior to Dobbert's trial, Florida passed a new death penalty statute to conform to the new constitutional requirements as defined in *Furman v. Georgia*. Dobbert was tried and sentenced under the new statute, which was found constitutional in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Dobbert argued that, because the type of Florida death statute in effect when he committed his crime was later found to be unconstitutional, Florida had no valid death penalty at the time of his crime. Therefore, his trial and sentencing under the new law resulted in an ex post facto enlargement of the penalty for his crime subsequent to the time of its commission. The Supreme Court in *Dobbert* rejected the notion that constitutional invalidation of the former Florida death penalty statute rendered it a nullity. 432 U.S. at 297, 97 S.Ct. at 2300. *See Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374, 60 S.Ct. 317, 318, 84 L.Ed. 329 (1940). Instead, the Court found that the statute was an "operative fact" that gave defendant fair notice of the penalty — death — that

Florida would seek to exact for his crime. *Dobbert v. Florida*, 432 U.S. at 298, 97 S.Ct. at 2300. This notice provided compliance with the ex post facto provision of the United States Constitution. 432 U.S. at 298, 97 S.Ct. at 2300. The Arizona law prior to *Watson* here performed the same function. *See State v. Smith*, 125 Ariz. 412, 610 P.2d 46 (1980).[8]

Some of the appellants attempt to distinguish *Dobbert* on the ground that Dobbert was tried and sentenced under a constitutional death penalty statute, whereas they were originally tried and sentenced before *Watson*. The *Dobbert* opinion makes it clear that this is a distinction without ex post facto implications. The Supreme Court in *Dobbert* held that the new Florida statute was not an ex post facto law both because it was procedural and because it was ameliorative. 432 U.S. at 294, 97 S.Ct. at 2298. That is, it "neither made criminal a theretofore innocent act, nor aggravated a crime previously committed, nor provided greater punishment, nor changed the proof necessary to convict." 432 U.S. at 293, 97 S.Ct. at 2298. The "change" in the Arizona statute as a result of the interpretation by *Watson* is likewise both procedural and ameliorative. Its only effect was to enlarge the ability of defendants to introduce mitigating circumstances at sentencing. Thus, no ex post facto problems arise even with respect to those appellants tried and sentenced before *Watson*.

Appellants next argue that the invalidation of the previous Arizona sentencing procedure by *Watson* resulted in the acquisition of a fully matured right in each to receive a life sentence under Section 10, Chapter 138 of the 1973 Arizona Session Laws. This section provides that if the death penalty is held unconstitutional on final appeal, persons previously sentenced to death will receive a life sentence with no possibility of parole for 25 years. It follows, appellants insist, that to subject them to a more severe sentence than

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[8]Since none of appellants were convicted of a murder occurring between the dates of the district court's decision in *Richmond v. Cardwell* and the Arizona court's decision in *Watson*, the question whether the *Richmond v. Cardwell* pronouncement, that section 13-454 as interpreted was unconstitutional, prevented that statute from serving as an "operative fact" in terms of *Dobbert* is not presented.

life imprisonment is an enlargement of the penalty contrary to the ex post facto prohibition of the Constitution.

We do not agree. Our deference to Arizona's interpretation of its own laws requires this result. Questions of when and how section 10 takes effect pertain to Arizona law, and have been resolved adversely to appellants by the courts of that state. Section 10 provides for the imposition of a life sentence "[i]n the event the death penalty is held unconstitutional on final appeal." 1973 Ariz.Sess. Laws § 10, ch. 138. The *Watson* court held that section 10 was intended to apply only if the death penalty itself was found unconstitutional. 120 Ariz. at 441, 586 P.2d at 1265. An invalidation of sentencing procedures would not make section 10 operative. Therefore, appellants never received a life sentence under Arizona law. We are not empowered to provide such a sentence. Appellants have been, and continue to be, under sentence of death.

VII. THE DOUBLE JEOPARDY ISSUE

Appellants who were tried and sentenced to death prior to the decision in *Watson* claim that their resentencing under *Watson* violates the double jeopardy clause of the Fifth Amendment. We do not agree.

The double jeopardy clause does not prohibit resentencing. Nor does it absolutely prevent an increase in the original sentence on retrial following a reversal of a conviction. *North Carolina v. Pearce*, 395 U.S. 711, 719–21, 89 S.Ct. 2072, 2077–78, 23 L.Ed.2d 656 (1969). Double jeopardy, of course, does require that upon resentencing credit be given for punishment already endured under the first sentence. 395 U.S. at 718–19, 89 S.Ct. at 2077–78. However, to receive such credit the original punishment must have commenced. *Suggs v. Wilson*, 403 F.2d 52 (9th Cir. 1968). See the discussion at 513 F.Supp. at 14 n.17.

Inasmuch as none of the appellants can claim to have actually begun serving a death sentence, they once more argue that between sentencing and resentencing, their death penalties were reduced to life imprisonment. The argument proceeds as before: Upon the rendition of the Supreme Court's decision in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), or, at the latest, of the

Watson decision, they acquired a fully matured right to a life sentence under 1973 Ariz.Sess. Laws § 10, ch. 138. Service of that sentence commenced immediately. Because no credit can be given for this service when a death penalty is imposed, the imposition of the death penalty constitutes a second punishment for a single crime, which is proscribed by the Fifth Amendment guarantee against double jeopardy.

This argument fails as before. Appellants did not acquire a right to a life sentence. We agree with the district court's view that deference to Arizona's interpretation of its own laws requires that the life-sentence provision of section 10 be treated as activated only upon invalidation of the death penalty itself. *See Watson*, 120 Ariz. at 453, 586 P.2d at 1265.

Appellants also argue that, regardless of section 10, there exists a commonlaw doctrine that automatically reduces a death sentence to life imprisonment immediately upon invalidation of the state's death penalty law. We agree with the district court that the California cases cited by appellants do not establish such a doctrine, and that no such doctrine exists.[9]

Because the *Watson* court did not find the death penalty as such unconstitutional, appellants occupy a position identical to that of any convicted criminal who has had a sentence vacated for procedural irregularities. They are entitled to resentencing under correct procedures, no more and no less. Nor can resentencing of the appellants here result in a more severe sentence than already has been imposed. To impose the same sentence following vacation of the

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[9] In *People v. Harvey*, 76 Cal.App.3d 441, 142 Cal.Rptr. 887 (1978), and *People v. Payne*, 75 Cal.App.3d 601, 142 Cal.Rptr. 320 (1977), California courts of appeals interpreted a California Supreme Court decision, *Rockwell v. Superior Court of Ventura County*, 18 Cal.3d 420, 134 Cal.Rptr. 650, 556 P.2d 1101 (1976), as mandating a reduction of the appellants' death sentences to life imprisonment. These cases are distinguishable. *Rockwell* held the death penalty portion of the California statute unconstitutional, and, unlike the Arizona Supreme Court in *Watson*, held that it could not be saved by statutory interpretations. The Arizona and California courts were each exercising the prerogative to interpret their own state's statutes. The fact that they came to different conclusions as to the constitutionality of different statutes raises no federal constitutional question.

original sentence for procedural error does not encounter the barrier of double jeopardy.

Next, appellants invoke *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), in arguing that the *Watson* resentencing procedures are defective. They insist that their first sentencing constituted an implicit acquittal of each aggravating circumstance found not to exist in that proceeding, and that *Bullington* prevents a contrary finding on resentencing. We do not agree.[10]

Bullington is distinguishable. There the petitioner, Bullington, was convicted of murder and sentenced to *life imprisonment* rather than death under Missouri death penalty statute providing for a separate penalty phase of the trial before the judge and jury to determine which of the two authorized punishments, death or life imprisonment, should be applied. At the penalty phase under Missouri procedure, the jury hears opening and closing arguments of counsel, evidence of statutory aggravating circumstances, evidence of mitigating circumstances, and instructions from the judge. To impose the death penalty, the jury must find unanimously beyond a reasonable doubt that at least one of the statutory aggravating circumstances exists, must set forth and list the aggravating circumstances it finds, and find that the aggravating circumstances found are sufficient to warrant the imposition of the death penalty. The jury must also determine that the aggravating circumstances are not outweighed by any mitigating circumstances. Its findings are binding

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[10]Because appellants were sentenced to death, they do not here claim acquittal of the death penalty but of all those aggravating factors not found in their first sentencing proceeding. Such a claim appears to be one of "collateral estoppel." Were we to accept their argument it would be equally appropriate to estop appellants from denying at resentencing the aggravating factors found to exist in their first proceeding or claiming enumerated mitigating factors not found there. Such holdings would undercut the ability of the court on resentencing to sentence the man before it rather than the man at the time of the first sentencing. *See Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion). Indeed, in response to the claim of one of the appellants here, the Arizona Supreme Court held that it was error not to reconsider the evidence of aggravating circumstances at the resentencing hearing. *State v. Bishop*, 127 Ariz. 531 at 533, 622 P.2d 478 at 481 (1980) (the error was held to be harmless on the facts in the case).

upon the trial court judge. The *Bullington* Court found this procedure so like a trial on guilt that the rendition of a life sentence was a finding that the government had failed to prove its case for the imposition of the death penalty. Therefore, at Bullington's retrial the government could not again seek the death penalty.

The *Bullington* Court indicated no intention to overrule those cases that permit harsher resentencing where the first sentence was rendered under a more flexible scheme involving discretionary balancing of circumstances by the sentencing body. Further, the *Bullington* Court did not address the issue of the manner in which individual aggravating circumstances should be treated on resentencing *when the original sentence imposed the death penalty.*

The present case is clearly distinguishable from *Bullington*. First, appellants in this case, unlike Bullington, were sentenced to death at their original sentencing. There exists no implied "acquittal" in the case. *See Bullington*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (Justice Powell, dissenting). The sentence that can be imposed on resentencing here cannot be more severe than that previously assessed. Fundamentally, the *Watson* procedures are, using Chief Justice Burger's words from *Dobbert v. Florida, supra*, 432 U.S. at 304, 97 S.Ct. at 2303 (Burger, C. J., concurring), "if anything, more favorable to the petitioner" than those it replaced. In addition, the Arizona sentencing procedure, both before and after *Watson*, bears less resemblance to a trial than did that of Missouri. For example, the Arizona sentencing decision is made by the judge rather than the jury, and the procedure for presenting the evidence in Arizona is much less trial-like. These differences lend weight to our holding that in this case no implied acquittals have been shown to exist.

At the resentencing hearing of at least one of the appellants, evidence of aggravating circumstances was introduced that had not been introduced at the first sentencing hearing. *State v. Valencia*, 124 Ariz. 139, 602 P.2d 807 (1979) (evidence that appellant was convicted of another crime after the first hearing). In light of our finding that the *Watson* change in interpretation of section 13-454 is procedural and ameliorative, and in light of our finding that *Bullington* is distinguishable, we hold that this does not constitute double jeopardy. A resentencing hearing at which any evidence of both aggravating and mitigating circumstances is received does not

violate appellants' constitutional rights, even if the evidence developed or was discovered after the original sentencing hearing or was not introduced there for some other reason.

VIII. SPEEDY SENTENCING

We agree with the district court that appellants' speedy sentencing arguments are not appropriately considered in a class action, and we express no opinion on the merits of any individual speedy sentencing claims.

AFFIRMED.

ADAMS, Circuit Judge, Sitting by Designation, concurring in part and dissenting in part.

I join with the majority in all respects but one, namely, the validity of the resentencing procedures which permit the new sentence to rest on findings of aggravating circumstances that were found, in the first sentencing proceeding, not to be present in the crime. The majority asserts that reconsideration of any such circumstances would not constitute double jeopardy. Guided by the interpretation of the double jeopardy clause recently advanced by the United States Supreme Court in *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), I would permit reconsideration only of a narrower class of such aggravating circumstances — those that do not rest on evidence similar in nature to that supporting a conviction or acquittal of a crime. Because the record does not make clear whether on resentencing a death sentence had been imposed on any of the defendants in reliance on what I would consider an impermissible new finding of an aggravating circumstance, I would remand to the district court for such a determination.

Although it addresses a different factual situation, *Bullington v. Missouri* is, as the majority recognizes, relevant to the problem we face here. In *Bullington*, the defendant had been convicted of first-degree murder and sentenced to life imprisonment, but a new trial was granted because of constitutionally defective jury selection. At the second trial, Bullington was again convicted. At his second sentencing proceeding, the prosecution again sought the imposition of the death penalty, even though the sentencing jury at the first

sentencing proceeding had not found the aggravating and mitigating circumstances to warrant a sentence of death. The Supreme Court of Missouri ruled that the prosecution could seek the death penalty the second time, and Bullington appealed.

In reviewing the Missouri Supreme Court ruling, the United States Supreme Court reaffirmed its earlier holdings that resentencing within the limits existing at the time of the first sentence generally does not implicate the double jeopardy clause. *Id.* 451 U.S. at 446, 101 S.Ct. at 1862, 68 L.Ed.2d at 278. *See, e.g., United States v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980); *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). And the Court reaffirmed *Stroud v. United States*, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103 (1919), where the imposition of a death sentence on resentencing following an initial life sentence was held not to violate the double jeopardy clause. But the Supreme Court in *Bullington* distinguished those earlier cases, and other similar cases, on the ground that they had addressed situations in which the sentencing was essentially discretionary, so that a lesser sentence could not be construed as an acquittal of any factual charge. The *Bullington* majority considered the features of the Missouri death sentencing procedure to be significantly different from the normal sentencing procedure[1] and inferred from those special features that a sentencing jury's imposition of a life sentence rather than a death sentence was in effect a finding that the State had failed to establish beyond a reasonable doubt its case that the death penalty was warranted. Because the Supreme Court considered that determination to be the functional equivalent of an acquittal of criminal charges, it held that the Missouri Supreme Court, by exposing Bullington to the risk of a death sentence in the second hearing after the State

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[1]In particular, the Supreme Court noted that under the Missouri arrangement the sentence was imposed by a jury that was confined to two choices — life imprisonment or death — and was guided in its choice by articulated standards. The Court emphasized that the jury could not impose the harsher penalty unless the prosecution met "the burden of establishing certain facts beyond a reasonable doubt," and observed that the structure of the hearing strongly resembled that of a trial. 451 U.S. at 438 & n.10, 101 S.Ct. at 1857–58 & n.10, 68 L.Ed.2d at 278–79 & n.10.

had failed to prove its case in the first hearing, had contravened the double jeopardy clause. 451 U.S. at 437–51, 101 S.Ct. at 1857–64, 68 L.Ed.2d at 278–84.[2]

The defendants in the present case each received a death sentence at the first hearing; unlike Bullington, they were not exposed to the possibility of a harsher sentence at the second hearing. However, the majority would permit some of the defendants here to be subjected at their second sentencing procedure to reconsideration of all explicit findings originally made in their favor, even though, if all mitigating circumstances had properly been considered the first time, those findings might have resulted in a life sentence rather than death at the first hearing. Although, because of the narrowness of its holding, *Bullington* may be of uncertain application outside the facts of its specific environment (a sentence of life at the first hearing, followed by the possibility of a death sentence at the second hearing), the reasoning of that case would appear incompatible with the majority's holding here, even though the defendants here were not exposed to the risk of harsher sentences at the second hearing than they actually received at the first.

Indeed, in some ways the double jeopardy question in the present situation may even be *less* troublesome than that confronted in *Bullington*. The Supreme Court there appeared to be concerned with ascertaining the extent to which the life sentence constituted an acquittal of factual allegations rather than an exercise of discretion. The Court placed great emphasis on the trial-like nature of the Missouri death sentencing procedure precisely because that similarity supported the inference that a life sentence arising out of the proceeding was in effect an acquittal of the factual predicate for a death sentence 451 U.S. at 437–51, 101 S.Ct. at 1857–64, 68

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[2]The four dissenting Justices in *Bullington* agreed that the crucial question for double jeopardy purposes was whether the sentencing determination was sufficiently akin to an acquittal. However, the dissenters contended that a life sentence in the Missouri proceeding did not constitute an implicit acquittal of any charge, and would have held the double jeopardy clause inapplicable because resentencing did not expose the defendant to a renewed "possibility of error as to guilt or innocence." 451 U.S. at 451, 101 S.Ct. at 1864–65, 68 L.Ed.2d at 285–87 (Powell, J., dissenting).

L.Ed.2d at 278–84. *See* Comment, *The Supreme Court Term, 1980*, 95 Harv.L.Rev. 91, 118 (1981). Here we are not confronted with the task of uncovering the precise predicate of a sentence; rather, in the present situation we have explicit factual findings of the sentencing judge at the initial hearing as to the existence or nonexistence of each enumerated aggravating circumstance. *See* Ariz.Rev.Stat. § 13-454(C), amended and recodified at § 13-703(D).[3] Some of these findings, such as those going to heinousness, pecuniary motive, or risk of death, would normally rest on evidence similar in nature to that supporting a conviction or acquittal on guilt. If the life sentence in *Bullington* constituted, for purposes of double jeopardy, an "acquittal" of aggravating circumstances that would be necessary to sustain a death sentence, it is difficult to suggest — as does the majority — that an explicit finding at a sentencing

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[3]Section 454(C) provided:

> The Court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection E and as to the existence or nonexistence of each of the circumstances in subsection F.

To decide that these findings, in effect, constitute acquittals, therefore, we would not be limited to the inferences one could draw from any similarity between the Arizona sentencing procedure and a trial. The explicitly factual nature of the findings present much stronger evidence of their import than does the inferential evidence on which the *Bullington* court was required to rely. Nevertheless, the Arizona death sentencing scheme is quite similar to the Missouri procedure in the respects emphasized in *Bullington*. Although in Arizona the sentence is rendered by a judge rather than a jury, the judge is limited in a number of crucial respects. In particular, the sentencing judge may find an aggravating circumstance to be present only if the circumstance has been shown beyond reasonable doubt to have existed. *State v. Jordan*, 126 Ariz. 283, 614 P.2d 825 (1980). The judge imposes the sentence only after a hearing at which evidence may be submitted by both the prosecution and the defense, and "the admissibility of information relevant to any of the aggravating circumstances . . . shall be governed by the rules governing the admission of evidence at criminal trial." Ariz.Rev.Stat. § 13-902(C). Although we do not face here a challenge to a death sentence imposed in place of an initial life sentence, it would appear that in such a case a life sentence imposed under the Arizona procedure, like a life sentence imposed under the Missouri scheme, might well constitute an implicit acquittal of the requisites for a death sentence even in the absence of the express factual findings involved in this case.

hearing as to the nonexistence of an aggravating circumstance, when that finding rests on evidence similar to that which would be adduced at trial, is not an "acquittal" of that aggravation, and of any death sentence based even in part on that aggravation.

Following a finding, resting on factual evidence presented at a sentencing hearing, that an aggravating circumstance did not exist, the reasoning in *Bullington* would appear to militate against permitting the prosecution a second chance to prove that the aggravating circumstance did exist and justified the imposition of the death penalty. This would most clearly be so where the State wished to establish at the second hearing the existence of an aggravating circumstance that took place *before* the initial sentencing hearing, but that the State, for whatever reason, had failed to establish initially. For example, in the case of appellant Jordan, the aggravating circumstances that had justified the initial imposition of the death sentence had consisted solely of several prior convictions. On resentencing, the judge also found that the specific crime for which he was being sentenced had been heinous and for pecuniary gain.[4] But if the State wished to introduce sufficient evidence to establish that, say, "The defendant committed the offense in an especially heinous, cruel, or depraved manner," Ariz.Rev.Stat. § 13-902(E)(6), it had at the first sentencing hearing its "one fair opportunity to offer whatever proof it could assemble," *Bullington v. Missouri*, 451 U.S. at 446, 101 S.Ct. at 1862, 68 L.Ed.2d at 283; *Burke v. United States*, 437 U.S. 1, 16, 98 S.Ct. 2141, 2149, 57 L.Ed.2d 1 (1978); *Bullington* would appear to hold that "the State is not entitled to another." 451 U.S. at 446, 101 S.Ct. at 1862, 68 L.Ed.2d at 283. A new opportunity to show the existence of that aggravating circumstance would provide the same sort of repeated attempt to convict that the Supreme Court in *United States v. DiFrancesco*,

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[4]In affirming Jordan's sentence, the Arizona Supreme Court disregarded the additional findings of aggravating circumstances, noting that no mitigating circumstances had been found and that the presence of at least one aggravating circumstance other than those newly found was sufficient under the statute to call for imposition of the death penalty. *State v. Jordan*, 126 Ariz. 283, 614 P.2d 825 (1980).

449 U.S. 117, 136, 101 S.Ct. 426, 437, 66 L.Ed.2d 328 (1980), observed to be absent in the ordinary resentencing situation.[5]

It is not clear from the record, especially because at the time of argument resentencing of some of the appellants had apparently not been completed, whether any appellants have been sentenced to death on the basis of a finding of a new aggravating circumstance resting on factual evidence that could have been adduced at the first trial, or whether any appellants are currently defending allegations of such aggravating circumstances in the course of ongoing resentencing proceedings. It does appear that at least one appellant, Valencia, has been sentenced to death on the basis, in part, of a separate conviction that was rendered subsequent to the initial sentencing hearing. *State v. Valencia*, 124 Ariz. 139, 602 P.2d 807 (1979). This sort of aggravating circumstance, however, presents a significantly different question from that posed by most of the aggravating circumstances under the Arizona statute.

One crucial distinction is that, in a case such as Valencia's, the new finding of an aggravating circumstance is based on an event occurring after the initial sentencing hearing. *North Carolina v. Pearce* would suggest that, at least in an ordinary sentencing proceeding (*i.e.*, one not involving capital punishment), this new conviction could be considered by the judge on resentencing because it took place after the first sentencing proceeding. *See* 395 U.S. at 726, 89 S.Ct. at 2081. On the other hand, it appears that *Bullington* might foreclose a prosecutor in Missouri from seeking a death sentence on resentencing, even if a separate conviction had been rendered in the interim, once the initial setencing jury had sentenced

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[5]The majority suggests that such a bar would constitute "collateral estoppel," and that if invoked must, under the concept of mutuality, bind the defendant as well as the prosecution to any unfavorable factual findings that were not tainted by the defects requiring resentencing. At 1264 n.10. But the concept of mutuality would not appear to apply in this sort of "collateral estoppel." This is so because double jeopardy is a constitutional doctrine that provides the defendant with protections not afforded the prosecution — one of the ways in which "[i]n the administration of criminal justice, our society imposes almost the entire risk of error upon itself," *Addington v. Texas*, 441 U.S. 418, 423–24, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323 (1979).

the defendant to life imprisonment. But neither *Pearce* nor *Bullington* provides clear guidance in a case such as Valencia's, where consideration of a conviction — previously found by the sentencing judge not to exist — cannot lead to a sentence harsher than that meted out initially. In the absence of such guidance, I would rely, as did the dissenting Justices in *Bullington*, on the general concerns underlying the double jeopardy clause — specifically, the concern that relitigation of factual issues may impose an unwarranted burden on the defendant and increase the risk of an erroneous finding of guilt. *See* 451 U.S. at 451–52, 101 S.Ct. at 1864–65, 68 L.Ed.2d at 586–87 (Powell, J., dissenting).

This concern illuminates a second, and more fundamental distinction in sentencing proceedings between the aggravating circumstance of intervening criminal convictions and other sorts of aggravating circumstances. In the situation before us, it does not appear that consideration of intervening criminal convictions increases the chance of erroneous findings. Introduction of intervening convictions at resentencing does not afford the prosecution with more than one opportunity to introduce such evidence, nor does it require the defendant to litigate an issue which he legitimately could have considered to be closed. Moreover, a sentencing judge's initial finding that the defendant has not been convicted of another felony — unlike a finding with respect to other sorts of aggravating circumstances — bears little resemblance to an acquittal. A finding with respect to heinousness, for example, would normally require consideration of a number of factual matters that would have to be inferred from the record or from testimony. Disproving a charge of heinousness might prove difficult and onerous for a defendant, just as disproving guilt at trial would be. But a finding as to a prior conviction is different in nature from a finding as to heinousness: a prior conviction is generally a matter of public record, and usually requires little factual inquiry.

Under the standards set out in *Bullington*, I do not believe that a finding as to the non-existence of other convictions can be deemed an acquittal, at least with respect to other convictions rendered after the initial sentencing hearing but before resentencing. I am persuaded, however, that findings as to other sorts of aggravating circumstances, with factual predicates that are not a matter of official public record, do constitute "acquittals" for double jeopardy

purposes. Because it appears possible that some of the appellants may have been sentenced in reliance on, or may now be forced to defend against, new findings of aggravating circumstances of the latter type, I would remand to the district court the cases of those appellants who have been resentenced subsequent to *Watson* for a determination whether the procedures by which they have been or are being resentenced violate the double jeopardy clause.

APPENDIX B:

KNAPP v. CARDWELL,

513 F.Supp. 4 (D.Ariz. 1980).

Appendix B

United States District Court

D. Arizona

No. CIV 78-385 PHX CAM.

JOHN HENRY KNAPP
et al., Petitioners,

v.

HAROLD J. CARDWELL,
Respondent

William J. Schafer, III, Chief Counsel, Crim. Div., Phoenix, Ariz., for respondent.

John Foreman, Phoenix, Ariz., for petitioners Paul William Jordan and John Henry Knapp.

John P. Frank, Phoenix, Ariz., for amicus curiae.

Frank C. Nielsen, Kingman, Ariz., for James Alan Arnett.

David A. Chamberlain, Prescott, Ariz., for Ronald Paul Bishop.

Thomas E. Higgins, Jr., Tucson, Ariz., for Mitchell Thomas Blazak.

Charles L. Weninger, Tucson, Ariz., for Richard B. Britson.

Joe Erlichman, Phoenix, Ariz., for Robert Paul Brookover.

Chris E. Wotruba, Phoenix, Ariz., for Paris Hoyt Carriger.

Brice Buehler, Phoenix, Ariz., for Jose Jesus Ceja.

James Kerley, Bisbee, Ariz., for James Dean Clark.

Jordan Green, John E. Savoy, Murray Miller, Phoenix, Ariz., for Max Anderson Dunlap.

J. Douglas McVay, Phoenix, Ariz., for Larry Eugene Evans.

Robert C. Brown, Casa Grande, Ariz., for Randy Greenawalt.

David S. Hoffman, Tucson, Ariz., for Douglas Edward Gretzler.

Thomas V. Rawles, Phoenix, Ariz., for Wilmer G. Holsinger, Mark Allen Koch and Ronald Lee Madsen.

Frederick S. Klein, Tucson, Ariz., for Jimmie Wayne Jeffers.

Donald E. Wolfram, Phoenix, Ariz., for Manuel Thomas Lujan.

John Rood, Phoenix, Ariz., for Loris Lee McVay.

James H. Kemper, Phoenix, Ariz., for Luis Mata, Stevenson L. McDaniel and James Albert Robison.

Robert L. Storrs, Phoenix, Ariz., for Ruben Melendez.

Edwin F. Cathcart, Tempe, Ariz., for Joe Morales.

Allen G. Minker, Tucson, Ariz., for Willie Lee Richmond.

Stephen M. R. Rempe, Phoenix, Ariz., for Joe Clarence Smith.

Terry J. Adams, Phoenix, Ariz., for Sylvester Smith, Jr.

Robert B. Norgren, Tucson Ariz., for Willie Luther Steelman.

Boyd T. Johnson, Coolidge, Ariz., for Raymond Tison.

Phillip W. Glenn, Casa Grande, Ariz., for Ricky Tison.

Thomas G. Martin, Tucson, Ariz., for Frank James Valencia.

Michael F. Beers, Casa Grande, Ariz., for Robert Wayne Vickers.

Michael J. Meehan, Tucson, Ariz., for Spencer Watson.

OPINION AND ORDER

MUECKE, Chief Judge.

On May 13, 1978, petitioner John Henry Knapp, an inmate on Arizona's death row, brought before this Court, pursuant to 28 U.S.C. § 2254, a Petition for Writ of Habeas Corpus, seeking to enjoin his execution by respondent. After court proceedings in this, and other related cases, Knapp's action has reached its present

posture. A brief historical review will be helpful to an understanding of the issues presented to the Court.

In 1973, the Arizona legislature adopted A.R.S. §§ 13-453[1] and 454,[2] both of which have since been repealed. Section

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[1]A.R.S. § 13-453 provides: *Punishment for murder*

A. A person guilty of murder in the first degree shall suffer death or imprisonment in the state prison for life, without possibility of parole until the completion of the service of twenty-five calendar years in the state prison, as determined by and in accordance with the procedures provided in § 13-454.

B. A person guilty of murder in the second degree shall be punished by imprisonment in the state prison for not less than ten years. As amended Laws 1973, Ch. 138, § 2.

[2]A.R.S. § 13-454 provides: *Proceedings for determining sentence upon the finding or admitting of guilt in cases of murder in the first degree*

A. When a defendant is found guilty of or pleads guilty to first degree murder, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in subsections E and F, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

B. In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances set forth in subsection E or F. Any information relevant to any of the mitigating circumstances set forth in subsection F may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection E shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances set forth in subsections E and F. The burden of establishing the existence of any of the circumstances set forth in subsection E is on the prosecution. The burden of establishing the existence of the circumstances set forth in subsection F is on the defendant.

C. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection E and as to the existence or nonexistence of each of the circumstances in subsection F.

D. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall take into account the aggravating and mitigating circumstances enumerated in subsections E and F and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection E and that there are no mitigating circumstances sufficiently substantial to call for leniency.

E. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner.

F. Mitigating circumstances shall be the following:

1. His capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. He was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. He was a principal, under § 13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. He could not reasonable have foreseen that his conduct in the course of the commission of the offense for which he ws convicted would cause, or would create a grave risk of causing, death to another person. Added Laws 1973, Ch. 138, § 5.

13-453 stated that upon conviction of murder in the first degree, a defendant could be sentenced to either death or to life imprisonment without parole for twenty-five years. Section 13-454 set forth the procedure by which the death penalty could be imposed. It provided that once the state proved the existence of one or more of the "aggravating circumstances" contained in subsection E of the statute, the burden of proof switched to the defendant to establish "mitigating circumstances." If the defendant were unable to do so, death was mandatory. Subsection F of Section 13-454 listed four mitigating circumstances that could be considered by the court.

On December 20, 1976, in *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1977), the Arizona Supreme Court held that the mitigating circumstances enumerated in A.R.S. § 13-454(F) were intended to be exclusive and that sentencing courts were powerless to consider other factors such as defendant's age, his prior record, or the extent of his cooperation with the authorities. The court's restrictive interpretation of subsection F was reaffirmed in *State v. Bishop*, 118 Ariz. 263, 576 P.2d 122 (1978).

On April 21, 1978, two death-row inmates petitioned this Court for writs of habeas corpus, pursuant to 28 U.S.C. § 2254, alleging the unconstitutionality of A.R.S. § 13-454 as interpreted in *State v. Richmond, supra*, and *State v. Bishop, supra*. *Richmond v. Cardwell*, 450 F.Supp. 519 (D.Ariz.1978). The Court concluded that the failure of Section 13-454 to permit consideration of all relevant mitigating circumstances violated petitioners' rights under the eighth and fourteenth amendments of the United States Constitution and enjoined the state from putting petitioners to death. *Id.* at 526.

On May 2, 1978, the Arizona Supreme Court directed the execution of John Henry Knapp. Knapp immediately instituted the present action, alleging that the Court's reasoning *Richmond v. Cardwell, supra*, was applicable to all inmates on Arizona's death row. On May 12, 1978, this Court entered an order permitting Knapp's suit to proceed as a class action under Rule 23(b)(1) and (b)(2) of the Federal Rules of Civil Procedure and enjoined respondent from imposing the death penalty on any State prisoners.

On July 3, 1978, the United States Supreme Court decided *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and *Bell v. Ohio*, 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d

1010 (1978), in which it struck down Ohio's death penalty statute for the same reasons given by this Court in *Richmond v. Cardwell, supra.*[3]

On July 20, 1978, the Arizona Supreme Court handed down *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), in which the court addressed the effect of *Lockett* on its position that Section 13-454 limited the mitigating circumstances that could be considered by a sentencing court with respect to defendants convicted of first-degree murder. Although the Arizona court found this restriction unconstitutional, it held that had the state legislature been aware of the problem, it would have permitted consideration of all relevant mitigating circumstances. Thus, the court ruled that the constitutional portion of A.R.S. § 13-454 was "severable" from that which was unconstitutional, and remanded defendant's case for resentencing under the newly-construed statute.

On May 1, 1979, the Arizona legislature adopted the present version of A.R.S. § 13-703[4] which, in essence, codified the changes made in *State v. Watson, supra*. As a result of the *Watson* decision, and the enactment of Section 13-703, Arizona's death row now consists of the following groups of inmates: those sentenced or resentenced pursuant to *Watson;* those sentenced pursuant to Section 13-703; and those sentenced prior to *Watson* whose resentencing is now pending. This opinion is concerned only with the effect of the *Watson* decision on the constitutionality of the death penalty in Arizona. The validity of Section 13-703, or the sentences of those sentenced pursuant to it, is not at issue in this case.

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[3] On that same day, the United States Supreme Court vacated the judgment of the Arizona Supreme Court in *State v. Jordan*, 114 Ariz. 452, 561 P.2d 1224 (1976) "insofar as it leaves undisturbed the death penalty imposed," *Jordan v. Arizona*, 438 U.S. 911, 98 S.Ct. 3138, 57 L.Ed.2d 1157 (1978). It is noteworthy that the defendant in *Jordan* presented no evidence in mitigation at his sentencing hearing and that the issue of the constitutionality of Arizona's restriction on mitigating circumstances was not discussed.

[4] The most significant difference between the pre-1979 version of A.R.S. § 13-703 and its predecessor, Section 13-454, was that the more recent statute added for consideration a fifth mitigating factor: the defendant's age.

THE PRESENT MOTION

On January 9, 1980, respondent moved to dissolve this Court's injunction of May 10, 1978, on the basis that the above inmates had been (or will be) sentenced under a procedure that permits consideration of all mitigating circumstances.[5] Petitioners, through counsel, filed numerous responses, some of which raised a variety of legal issues.[6] Oral argument was held on February 25, 1980, after which the Court took the matter under advisement. Since oral argument, two petitioners have filed supplemental memoranda, and respondent has replied thereto.

At the heart of respondent's motion is the validity of the Arizona Supreme Court's decision in *State v. Watson*, *supra*. There is no question that *Watson* professes to remedy that which was the basis of this Court's original injunction. The issue is whether the means chosen by the Arizona Supreme Court are subject to constitutional objections.

DID WATSON DELETE LANGUAGE FROM SECTION 13-454?

Several petitioners argue that the *Watson* Court deleted subsection F from Section 13-454, thereby severing the statute's list

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[5]Respondent, by his Motion to Dissolve Injunction; Motion to Vacate Order Allowing Class Action; Motion to Determine Membership of Class, filed January 9, 1980, first asked for an order vacating this Court's Order of May 12, 1978, which permitted petitioner Knapp's suit to proceed as a class action under Rule 23(b)(1) and (b)(2), Fed.R.Civ.P., for the reason that many petitioners in this action have separate actions in which the questions here presented could be handled. The Court is of the opinion that the ends of justice and judicial economy are better served by permitting this case to proceed as a class action, and therefore denies this aspect of respondent's request. This Opinion will deal with respondent's alternative motions.

[6]Rather than discuss all of petitioners' arguments, the Court will address only those points that the Court finds dispositive. Petitioners' remaining arguments are either individual claims better raised in individual actions or are without substantial merit. Since the arguments not discussed here are not foreclosed by this Opinion and Order, there is no prejudice to petitioners in treating them summarily.

of the mitigating circumstances a court must consider in its decision whether to impose death. From this proposition, it is urged that all statutory reference to subsection F is meaningless and that Section 13-454 is rendered void for vagueness. Alternatively, it is argued that without subsection F, sentencing courts are no longer permitted to consider *any* mitigating circumstances — a clear violation of the eighth amendment. This Court's analysis of *Watson* makes it unnecessary to address the merits of either of these contentions.

While *Watson* was not overly explicit as to the means by which it constitutionalized Section 13-454, a close reading of the case makes it apparent that the Arizona court altered the statute through reinterpretation rather than by deleting specific statutory language. This conclusion is supported by two findings. First, the restriction on mitigating circumstances that was "severed" in *Watson* cannot be found in the express language of Section 13-454. Rather, it was the product of the court's prior interpretations in *State v. Richmond, supra*, and *State v. Bishop, supra*. Second, at no point in the *Watson* decision did the court invalidate or strike specific language of Section 13-454. It removed only that portion of the statute which restricted mitigating circumstances.

Section 13-454 contains no language which demands the restrictive view of *State v. Richmond* and *State v. Bishop* that "subsection D authorizes the trial court to take into account only those mitigating circumstances enumerated in subsection F." *State v. Richmond*, 114 Ariz. at 204, 560 P.2d at 50. Subsection F gives no express indication of whether its list was intended to be illustrative or exclusive. It merely states "mitigating circumstances shall be the following. . ."[7] While subsection D requires the sentencing court to "take into account the . . . mitigating circumstances enumerated in subsection F," it stops short of limiting the court to those circumstances. Instead, subsection D states that the sentencing judge "shall impose a sentence of death if the court finds one or more of

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[7]This language is identical to that contained in Fla.Stat.Ann. § 921.141 (Supp.1979), which the United States Supreme Court interpreted to permit consideration of all relevant mitigating circumstances in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1975). *See* note 14, *infra*.

the aggravating circumstances enumerated in subsection E and that there are *no mitigating circumstances sufficiently substantial to call for leniency.*" (Emphasis added.)

Since the restriction on mitigating circumstances with which *Watson* was concerned cannot be found in the express language of subsections D or F, it must have been the product of judicial interpretation. This being the case, it is more likely that the court would remove the restriction by reinterpretation rather than by severing an identifiable portion of the statute.[8]

The view that the *Watson* decision was intended to overrule

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[8]That the Arizona Supreme Court was engaging in statutory interpretation when it held that "subsection D authorizes the trial court to take into account only those mitigating circumstances enumerated in subsection F," *State v. Richmond*, 114 Ariz. at 204, 560 P.2d at 50, was recognized by this Court in its 1978 decision in *Richmond v. Cardwell*, 450 F.Supp. 519 (D.Ariz.1978). After discussing the mitigating factors contained in subsection F, this Court stated:

> Factors absent in this statute are (to name a few), considerations of the defendant's age at the time the crime was committed, his prior record; and the amount and nature of his cooperation with authorities, whether his capacity at the time of the crime was affected by mental defect or intoxication. *Theoretically, if any of the above were relevant they might by implication be considered under one of the four mitigating factors listed in the Arizona statute. However, the Arizona Supreme Court has held otherwise.* In *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1977), the court held that the four mitigating factors in A.R.S. § 13-454 are exclusive. The court eliminates the possibility of implying relevant mitigating factors from the ones listed, by stating 'we hold that subsection D authorizes the trial court to take into account only those mitigating circumstances enumerated in subsection F.'

Id. at 522 (emphasis added). This Court went on to observe that:

> The inescapable conclusion is that the Arizona Supreme Court in construing the statute in question and in an attempt to prevent it from becoming vague and ambiguous, has defeated the respondent's position that the factors which have been omitted from the death penalty statute can be considered, where relevant, as being implied by the four enumerated mitigating circumstances.

Id. at 523.

the Arizona Supreme Court's own restrictive interpretations of Section 13-454 in *State v. Richmond* and *State v. Bishop*, rather than to delete specific statutory language is supported by a careful examination of the *Watson* opinion itself. Nowhere did the court state that subsection F in its entirety was unconstitutional. It merely invalidated that provision "*insofar as it limits* the right of the defendant to show additional circumstances. . . ." *State v. Watson*, 120 Ariz. at 445, 586 P.2d at 1257 (emphasis added).[9] Similarly, the court never expressed the desire to excise particular words or subsections from Section 13-454. Rather, the court spoke of the "unconstitutional portion" and the "offending portion," *id.* at 445, 586 P.2d at 1257, and held that "the statute remained in full force and effect and that *only* the *portion limiting the factors* in mitigation should be set aside." *Id* at 452, 586 P.2d at 1264 (emphasis added). At no point did the court set aside the "factors" themselves.

This Court's reading of *Watson* convinces it that when the Arizona Supreme Court posed the question "whether the constitutional and unconstitutional portions of A.R.S. §§ 13-453 and 454 are severable so that the constitutional portion of the statute can remain in force and effect," *State v. Watson*, 120 Ariz. at 445, 586 P.2d at 1257, the court was not speaking in terms of lopping off actual statutory language. It was merely asking whether the statute could stand without its restrictive interpretation.[10] So viewed, the

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[9]On rehearing, the court referred to its prior holding using similar language: "This Court, in *State v. Watson*, . . . held that *the restriction* in the showing of mitigating circumstances in the sentencing provisions of our death penalty statute, Section (D) of 13-454, was unconstitutional." 120 Ariz. at 451–52, 586 P.2d at 1263–64. Again, the court invalidates that which must be read into the statute rather than a portion of the statute itself.

[10]The finding that neither the language nor the legislative history of Section 13-454 demand a restrictive interpretation, *see* text accompanying notes 13–15, *infra*, and that the *Watson* Court was merely overruling its prior interpretations in *State v. Richmond* and *State v. Bishop*, answer petitioner's arguments that the circumstances of this case preclude the Court's use of the "doctrine of severability" as a means of constitutionalizing the statute. *Watson* severed nothing, save for its own prior interpretations.

post-*Watson* version of Section 13-454 is neither void for vagueness nor violative of the eighth or fourteenth amendments.

JUDICIAL LEGISLATION

Petitioners argue that the Arizona Supreme Court's alterations of Section 13-454 are unconstitutional in that they are supported by neither the legislative history nor the language of the statute.[11] In the face of such contentions, the role of a federal court is limited.

The Supreme Court has established that state courts can use statutory interpretation to validate otherwise questionable death penalty statutes. *Lockett v. Ohio, supra; Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1975).[12] Moreover, it is axiomatic that courts should construe legislation in a constitutional manner "if fairly possible." *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932). *See also Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973). So far as federal courts are concerned, the general rule is that the statutory interpretation of the highest court in the state is "as though written into the [statute] itself," *Poulos v. New Hampshire*, 345 U.S. 395, 402, 73 S.Ct. 760, 765, 97 L.Ed. 1105 (1953), and that state courts "have the final authority to interpret and, where they see fit to *reinterpret* that State's legislation." *Garner v. Louisiana*, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961) (emphasis

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[11]More specifically, petitioners argue that Watson's resentencing order violated the eighth amendment as a judicial imposition of a penalty or that it amounted to judicial legislation in violation of the constitutional guarantee of a republican form of government.

[12]In *Lockett*, the Court distinguished the statute with which it was dealing from those it upheld in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), and *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), on the basis that the Ohio statute scrutinized in *Lockett* expressly limited the number of mitigating circumstances the sentencing court could consider. 438 U.S. at 608. Although the *Jurek* and *Proffitt* statutes were unclear as to whether the court was so limited, they had been interpreted to permit consideration of all relevant circumstances. *Lockett, supra* 438 U.S. at 606–607, 98 S.Ct. at 2965–2966. It was this interpretation that saved them.

added). *See also, Wainright v. Stone*, 414 U.S. 21, 22–23, 94 S.Ct. 190, 192, 38 L.Ed.2d 179 (1973); *N.A.A.C.P. v. Button*, 371 U.S. 415, 432, 83 S.Ct. 328, 337, 9 L.Ed.2d 405 (1963); *Winters v. New York*, 333 U.S. 507, 514, 68 S.Ct. 665, 669, 92 L.Ed. 84 (1947). In passing on the question whether a Kansas antitrust statute was an unconstitutional infringement on the freedom to contract, the Supreme Court stated:

> It is well settled that in cases of this kind the interpretation placed by the highest court of the State upon its statutes is conclusive here. . . . Nor is it material that the state court ascertains the meaning and scope of the statute as well as its validity by pursuing a different rule of construction from what we recognize. . . . The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall by determined.

Smiley v. Kansas, 196 U.S. 447, 455, 25 S.Ct. 289, 290, 49 L.Ed. 546 (1904).

Petitioners argue that the Arizona Supreme Court's reinterpretation of Section 13-454 is nevertheless subject to federal review for the reason that its construction is manifestly unreasonable. Assuming for purposes of argument that such a finding would place petitioners within an exception to the general rule,[13] this Court's

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[13]The principal case relied upon by petitioners is *Baird v. Bellotti*, 450 F.Supp. 997 (D.Mass.1978), in which a federal district court held Massachusetts' abortion statute unconstitutional. That case is distinguishable on a number of grounds, one of which is the court's finding that "the Massachusetts court, in addition to contradicting its specific terms, suggests reading into the statute affirmative provisions made out of nothing but a generally announced purpose to pass constitutional muster." *Id.* at 1005. *Watson* is not such a case. Other cases cited by petitioners include *Mullaney v. Wilbur*, 421 U.S. 684, 691 n. 4, 95 S.Ct. 1881, 1883 n. 4, 44 L.Ed.2d 508 (1971) ("On rare occasions the Court has reexamined a state-court interpretation of state law when it appears to be an 'obvious subterfuge to evade consideration of a federal issue.' *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 [65 S.Ct. 1475, 1480, 89 L.Ed. 2092] (1945).") and *Demorest v. City Bank Co.*, 321 U.S. 36, 42, 64 S.Ct. 384, 388, 88 L.Ed. 526 (1943) ("Even though the constitutional protection invoked be denied on nonfederal grounds, it is the province of this court to inquire whether the decision of the state court rests upon a fair or substantial basis."). This Court's findings

reading of Section 13-454 defeats petitioners' argument. While Arizona's death penalty statute is not explicit on the issue of mitigation, this Court does not find the *Watson* Court's construction to be unreasonable.

As previously stated, there is nothing in the express language of Section 13-454 that restricts a sentencing court's ability to consider mitigating circumstances. In fact, Arizona's death penalty law is remarkably similar to the Florida statute upheld by the United States Supreme Court in *Proffitt v. Florida, supra*, and reexamined in *Lockett v. Ohio, supra*.[14] The legislative history of Section 13-

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regarding the reasonableness of the *Watson's* Court's reinterpretation of its own law make it unnecessary for it to pass on the applicability of these cases to the case at bar.

Finally, petitioners cite federal cases that discuss the role of a federal court in interpreting federal statutes, *see e.g., United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), and cite state cases that discuss the means by which a state court should construe state legislation, *see e.g., State ex rel. Berger v. Superior Court*, 106 Ariz. 365, 476 P.2d 666 (1970). The question before this Court, however, involves federal review of a state supreme court's construction of a state statute. The above cases are not directly helpful here.

[14]*See* Fla.Stat.Ann. § 921.141 (Supp.1979). Both statutes introduce their lists of mitigating circumstances with the language "mitigating circumstances shall be the following." Neither states whether its list is intended to be exclusive or illustrative. In *Lockett v. Ohio, supra*, the Supreme Court noted that it "assumed, in approving the [Florida] statute, that the range of mitigating factors listed in the statute was not exclusive." *Lockett, supra*, 438 U.S. at 606, 98 S.Ct. at 2965 (emphasis added). The Court went on to state that:

> The opinion of Justices STEWART, POWELL, and STEVENS in *Proffitt, supra*, noted that the Florida statute "provides that '[a]ggravating circumstances shall be *limited* to . . . [eight specified factors]' " and that there was 'no such limiting language introducing the list of statutory mitigating factors.' (Citations omitted).

Lockett, supra, 438 U.S. at 606 n. 15, 98 S.Ct. at 2966 n. 15 (emphasis in original).

> While there is language in the Florida statute that might make it more conducive to nonrestrictive interpretation than Section 13-454, these differences are not particularly significant. The Supreme Court in *Proffitt, supra*, was dealing with the question how the state's statute should be interpreted. Here, the state court has spoken. The only remaining issue is whether the interpretation which it eventually embraced is so unreasonable as to be unconstitutional. *See* note 13, *supra*.

454 is likewise ambiguous. While petitioners cite developments which they claim are compatible with the view that the Arizona legislature intended a restrictive reading of the statute, there is nothing that demands such a conclusion.[15]

Petitioners' only remaining argument is that the Arizona Supreme Court's refusal to retract its earlier position that the legislature

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[15]Neither *State v. Richmond, supra*, nor *State v. Bishop, supra*, cited legislative history in support of their holdings. Petitioners point to two events that occurred prior to the enactment of Section 13-454 which they feel demand the conclusion that the Arizona Legislature intended that the mitigating circumstances enumerated in subsection F be exclusive. The first incident emphasized by petitioners was the legislature's failure to enact a bill submitted by Attorney General Gary K. Nelson which provided for the consideration of more mitigating circumstances than those set forth in Section 13-454. Petitioners also point to the fact that Section 13-454, as finally enacted by the legislature, omitted a provision which had been included in the version passed by the State House of Representatives. That provision provided:

> Evidence may be presented as to any matter the sentencing panel deems relevant to sentencing, and shall include matters relating to any of the aggravating or mitigating circumstances in sections b and c of this session.

Journal of the House, 31st Legislature, First Regular Session, at 449. While the above incidents might be compatible with the view that the legislature intended to restrict mitigation, they are not nearly so persuasive as to compel that conclusion.

Petitioners also find significance in the legislature's post-*Watson* enactment of A.R.S. § 13-703, which left Section 13-454 largely unchanged. That statute, however, was part of a revision of the entire criminal code, which went into effect on October 1, 1978. We find no indication that, in passing on Section 13-703, the legislature was voicing its rejection of *Watson's* conclusions as to legislative intent. In fact, the legislation could have been a reaction to the interpretation of the death penalty statute by the Arizona Supreme Court in *State v. Richmond, supra*, and *State v. Bishop, supra*. This Court finds more significance in the legislature's May 1, 1979, revision of Section 13-703, which codified the alterations made by the *Watson* court.

intended a restrictive interpretation of Section 13-454 at the time of enactment precludes a finding that *Watson's* holding was the product of legitimate statutory construction. This argument is likewise without merit.

While it is true that the *Watson* Court maintained the view that "Section F of A.R.S. § 13-454 is exclusive in that pursuant to Section D of A.R.S. § 13-454, the Court may consider as mitigating circumstances only those contained therein," *State v. Watson*, 120 Ariz. at 444, 586 P.2d at 1256, the court went on to hold that, at the time of enactment, the legislature would have preferred a broad reading of subsections D and F to an invalidation of the entire statute. Noting that its restrictive reading of Section 13-454 was " 'severable from the rest in such a way that the legislature would be presumed to have enacted them independently . . .', *State ex rel. Berger v. Superior Court*, 106 Ariz. 365, 370, 476 P.2d 666, 671 (1970)", *State v. Watson*, 120 Ariz. at 452, 586 P.2d at 1264, the *Watson* Court went on to state that:

> We believe there is sufficient evidence in the legislative history of the enactment of this statute as well as the statute itself from which it is apparent that had the legislature anticipated that the legislation on mitigating factors would be found unconstitutional they would still have enacted the rest of the statute. Indeed, there is more than ample indication that the legislature intended a death penalty statute and were prepared to write one that complied with the United States constitutional guidelines.

Id. at 453, 586 P.2d at 1265.

Given the facts that neither the language nor the legislative history of Section 13-454 compel the conclusion that the Arizona legislature was opposed to open mitigation, and the state supreme court's findings that, at the time of enactment, the legislature would have preferred reinterpretation to statutory invalidation, there is sufficient basis on which to uphold the *Watson* interpretation of A.R.S. § 13-454.[16] This Court is aware of no further constitutional

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[16]A.R.S. §§ 1-211 *et seq.*, sets forth the rules of statutory construction by which the Arizona courts are bound. Section 1-211 requires that the courts observe

requirement that the state supreme court hold that is reinterpretation was originally intended by the legislature.

DOUBLE JEOPARDY

Those petitioners who have been resentenced pursuant to *Watson*, or whose resentencing is pending, argue that the double jeopardy clause of the fifth amendment to the United States Constitution protects them from the imposition of a second death penalty. This contention must be rejected.

The double jeopardy clause does not prohibit resentencing per se. It prevents only an increase in sentence, or the imposition of multiple sentences for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *Ex parte Lange*, 18 Wall. 163, 85 U.S. 163, 21 L.Ed. 872 (1873). Furthermore no change is proscribed unless a defendant's original punishment has commenced.[17] *Suggs v. Wilson*, 403 F.2d 52 (9th Cir. 1968).

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the rules set forth in Title 1, Chapter 2 ". . . unless such construction would be inconsistent with the manifest intent of the legislature." A.R.S. § 1-211(A). Section 1-211 also provides:

> B. Statutes shall be liberally construed to effect their objects and to promote justice. C. The rules of common law that penal statutes shall be strictly construed has no application to these revised statutes. Penal statutes shall be construed according to the fair import of their terms, with a view to effect their object and to promote justice.

In *Watson*, the Arizona Supreme Court indicated that the manifest intent of the legislature in enacting A.R.S. § 13-454 was that there be a death penalty, not that the mitigating factors be limited in number. *See Watson, supra*, 120 Ariz. at 445, 453, 586 P.2d at 1257, 1265.

[17]Even when a defendant's sentence has commenced, double jeopardy does not prohibit a court from resentencing him to a different penalty where the original sentence was wholly illegal or completely void, *see Bozza v. United States*, 330 U.S. 160, 67 S.Ct. 645, 91 L.Ed. 818 (1947); *United States v. Turner*, 518 F.2d 14 (7th Cir. 1975), or where a defendant has obtained a reversal of his original conviction. *See North Carolina v. Pearce* 395 U.S. at 720, 89 S.Ct. at 2078 ("And at least since 1919, when *Stroud v. United States*, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103, was decided, it has been settled that a corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever

For obvious reasons, none of the petitioners claims to have actually begun serving his death sentence. Moreover, it cannot be argued that petitioners resentenced pursuant to *Watson* have been subjected to multiple or increased penalties unless, between sentencing and resentencing, their death penalties were somehow reduced to life imprisonment. The *Watson* Court concluded that the defendant's death sentence was "merely set aside" upon the court's resentencing order, and that there had been no reduction of life imprisonment:

> There is no doubt that the double jeopardy clause applies to sentencing as well as conviction, *Ex Parte Lange*, 18 Wall. 163, 85 U.S. 163, 21 L.Ed. 872 (1873), and defendant cites several cases, two from California, *People v. Harvey*, 76 Cal.App.3d 441, 142 Cal.Rptr. 887 (1978), and *People v. Payne*, 75 Cal.App.3d 601, 142 Cal.Rptr. 320 (1977), as well as the South Carolina case of *State v. Rodgers* [270 S.C. 285], 242 S.E.2d 215 (S.C.1978) in support of his position. All three of these cases are distinguishable. In each of those cases, the defendants, after having been sentenced to death, had their sentences reduced to life imprisonment. After they had commenced to serve the life sentences, the state sought to have them resentenced under legislation enacted after the crime and the reversal. Thus, after the life sentences were at least partially served, the state attempted to subject them to another different and higher punishment. . . . We agree with the California court, but these cases are clearly distinguishable and do not apply to the case at bar. The defendant in the instant case never served his sentence (of death). His death sentence was not reduced to life imprisonment but was merely set aside pending resentencing. We find no violation of the double jeopardy clause

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sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction.") Moreover, in its 1899 decision in *Murphy v. Massachusetts*, 177 U.S. 155, 20 S.Ct. 639, 44 L.Ed. 711 (1899), cited in *North Carolina v. Pearce*, 395 U.S. at 720 n. 16, 89 S.Ct. at 2078 n. 16, the Supreme Court held that the double jeopardy clause does not bar a court from resentencing a defendant once he has successfully attacked his first sentence. In such circumstances, "it is well settled that a convicted person cannot by his own act avoid the jeopardy in which he stands, and then assert it as a bar to subsequent jeopardy." 177 U.S. at 158, 20 S.Ct. at 640.

in the instant case. See also *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

State v. Watson, 120 Ariz. at 453, 586 P.2d at 1265.

Petitioners argue that *People v. Harvey*, 76 Cal.App.3d 441, 142 Cal.Rptr. 887 (1978), and *People v. Payne*, 75 Cal.App.3d 601, 142 Cal.Rptr. 320 (1977), the two California Court of Appeals decisions distinguished in *Watson*, reflect a common law doctrine that "automatically" imposes life sentences upon state death row inmates following the invalidation of a state's death penalty statute.[18] These cases do not support such an assertion.

In *Rockwell v. Superior Court of Ventura County*, 18 Cal.3d 420, 134 Cal.Rptr. 650, 556 Pd.2d 1101 (1976), which preceded *Payne* and *Harvey*, the California Supreme Court invalidated California's death penalty statute. Unlike the *Watson* Court, however, the *Rockwell* Court found that the revisions suggested by the government would exceed the scope of legitimate statutory interpretation and would be "contrary to manifest legislative intent." *Id.* at 665, 556 P.2d at 1116. Since the court was unable to repair the statute, it severed the portion authorizing the death penalty from the remaining penalty provisions and ordered that "petitioner may therefore be sentenced to a term of life imprisonment." *Id.* Given this language, the California Court of Appeals in *People v. Harvey*,

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[18]Petitioners also cite this Court's Opinion in *Richmond v. Cardwell*, *supra*, as well as the United States Supreme Court's decisions in *Lockett v. Ohio*, *supra*, and *Jordan v. Arizona*, 438 U.S. 911, 98 S.Ct. 3138, 57 L.Ed.2d 1157 (1978), as having the effect of invalidating Section 13-454 and thus reducing their sentences to life imprisonment. *Richmond v. Cardwell*, *supra*, merely enjoined the execution of those petitioners who were parties to that action. While this Court found Section 13-454, as interpreted in *State v. Richmond* and *State v. Bishop*, to be unconstitutional, its ruling in no way invalidated Arizona's sentencing statute or reduced the penalties of those who were sentenced under it. The Supreme Court's decisions in *Lockett v. Ohio*, *supra*, and *Jordan v. Arizona*, *supra*, are also inapplicable. *Lockett* was concerned only with the law of Ohio, and had no direct impact on the validity of Arizona's statute. In *Jordan*, *supra*, the Supreme Court stopped short of invalidating Section 13-454. It merely vacated a death sentence that had been upheld by the Arizona Supreme Court and remanded for further proceedings in light of its decision in *Lockett*. *See* note 3, *supra*.

supra, held that the "practical effect" of the *Rockwell* decision "automatically reduced appellant's sentence to life imprisonment." *People v. Harvey*, 76 Cal.App.3d at 447, Cal.Rptr. at 891. *See also People v. Payne*, *supra* (in which the court of appeals had actually reduced the defendant's death sentence to life imprisonment pursuant to *Rockwell* prior to the state's motion for resentencing).

Contrary to petitioner's assertions, the above rulings by the California Court of Appeals did not and could not establish a common law doctrine applicable in all cases and all states where a death penalty statute has been invalidated. The *Rockwell* decision, which was interpreted in *Harvey* and *Payne*, is similar to *State v. Watson* only in that in each case the supreme court of a state was exercising its prerogative of passing on the constitutionality of the respective state's death sentencing procedures. While the *Watson* Court found that the Arizona statute could be saved through statutory interpretation, the California court reached a contrary conclusion. In addition, the *Watson* Court held that the effect of its ruling was to simply "set aside" the defendant's death sentence must be reduced to life imprisonment.

This Court is aware of no constitutional principle which prohibits the course taken by the *Watson* Court, and finds that the question whether a state court's invalidation of its death penalty statute actually triggers a lesser sentence or merely "sets aside" a defendant's death penalty "pending resentencing" is one of state, and not constitutional law.

Petitioners' second double jeopardy argument is that Arizona statutory law operated to impose life sentences on petitioners the moment *Watson* invalidated its prior restrictive interpretations of Section 13-454. They point to Chapter 138, Laws of 1973, Section 10, which provides that

> In the event the *death penalty* is held to be unconstitutional on *final appeal*, a person convicted of first degree murder or another offense punishable by death who had been sentenced to die shall be resentenced by the sentencing court to life imprisonment . . . (Emphasis added).

On the question whether Section 10 is applicable to the facts at hand, the *Watson* Court stated:

> Defendant contends that since we have found the death penalty unconstitutional, we therefore must sentence the defendant to twenty-five years. We do not agree.
> We did not find the death penalty to be unconstitutional. We held only that in determining the death penalty there are certain factors which, if presented by the defendant, the court must consider. The statute, as severed is valid.

State v. Watson, 120 Ariz. at 453, 586 P.2d at 1265. The Arizona Supreme Court's holding that the life-sentence provision of Section 10 is activated only upon invalidation of the death penalty itself, as opposed to the statutory sentencing procedure, is not unreasonable.[19] This Court, therefore accepts the State court's interpretation of its own law, *Poulos v. New Hampshire*, 345 U.S. 395, 402, 73 S.Ct. 760, 764, 97 L.Ed. 1105 (1953), and holds that petitioners' resentencing pursuant to *Watson* does not violate the double jeopardy clause.

EX POST FACTO

The ex post facto clause of the United States Constitution prohibits:

> any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to the law *at the time when the act was committed*. . . .

Beazell v Ohio, 269 U.S. 167, 169, 46 S.Ct. 68, 70 L.Ed. 216 (1925), (emphasis added); United States Constitution, Art. I, § 10, cl. 1. Decisions by the Supreme Court demonstrate that the ex post facto clause embodies the concept that persons have a right to fair warning of the conduct which will give rise to criminal penalties:

> The constitutional prohibition and the judicial interpretation of [the ex post facto clause] rest upon the notion

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[19] *See* Discussion re Judicial Legislation, *supra*.

> that laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused.

269 U.S. at 170, 46 S.Ct. at 69. Although the ex post facto prohibition applies of its own force only to legislative acts, the Court has struck down unforeseeable judicial enlargements of criminal statutes as violative of due process when applied retroactively. *See Marks v. United States*, 430 U.S. 188, 190, 97 S.Ct. 990, 991, 51 L.Ed.2d 260 (1977); *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964).

Petitioners contend that the retroactive application of *Watson's* interpretation of Section 13-454 amounts to the imposition of an ex post facto penalty in two respects. Emphasizing *Watson's* finding that a portion of Section 13-454 was unconstitutional, petitioners argue that the ex post facto clause protects them from the application of a newly enacted penalty.

Petitioners' second argument alleges that the differences between Section 13-454 and post-*Watson* sentencing are such that the retroactive application of the latter is likewise unconstitutional. The United States Supreme Court's recent decision in *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), answers both of petitioners' contentions.

In *Dobbert*, a Florida defendant was convicted of several murders which had occurred prior to April 8, 1972. The death penalty in effect at the time the murders were committed mandated that a person convicted of a capital felony was to be punished by death unless a majority of the jury recommended otherwise. On July 17, 1972, the Florida Supreme Court struck down this procedure as violative of the eighth and fourteenth amendments. *Donaldson v. Sack*, 265 So.2d 499 (Fla.1972). Before Dobbert's trial, however, the Florida legislature enacted a new death penalty procedure which gave the court sole responsibility for sentencing. The defendant was tried and sentenced pursuant to this latter statute.

Like petitioners, Dobbert attempted to avoid his death penalty by emphasizing the fact that the sentencing statute in effect at the time of the murders was later held unconstitutional. The Supreme Court rejected the significance of this point, stating that the mere fact that a penalty statute is invalidated after a crime has been committed does not render the imposition of the same penalty a violation of the ex post facto clause if, *at the time of the offense*, "the existence of the statute served as an 'operative fact' to warn the [defendant] of the penalty which [the state] would seek to impose on him if he were convicted. . . ." 432 U.S. at 298, 97 S.Ct. at 2300.

While it cannot be seriously argued that Section 13-454 failed to serve as an "operative fact" in terms of the above quotation,[20] several petitioners would distinguish *Dobbert* on the basis that the defendant in that case was tried and sentenced under a constitutional death penalty statute. Those who were tried between the dates of this Court's decision in *Richmond v. Cardwell* and the State's decision in *Watson* and then sentenced pursuant to *Watson* point out that they were tried at a time when the state was enjoined from imposing the death penalty. Similarly, those petitioners who were tried and sentenced under the pre-*Watson* version of Section 13-454 and then resentenced under *Watson* emphasize that they were tried and sentenced pursuant to an unconstitutional death penalty statute before being resentenced under constitutional conditions.

While petitioners cite several state court decisions which have distinguished *Dobbert* on the basis that their defendants had been tried and sentenced under unconstitutional death penalty statutes,

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[20]Since none of petitioners was convicted of a murder occurring between the dates of this Court's decision in *Richmond v. Cardwell*, *supra*, and the Arizona Court's decision in *State v. Watson*, *supra*, the question whether *Richmond's* pronouncement that Section 13-454, as interpreted, was unconstitutional, prevented that statute from serving as an "operative fact" in terms of *Dobbert* is not presented. Petitioners who committed murders after *Watson* but before the enactment of the present version of A.R.S. § 13-703 argue that *Watson* cannot serve as an "operative fact" within the meaning of *Dobbert*. This argument, however, pre-supposes the inability of *Watson* to remedy Section 13-454 — a position the Court does not accept.

including *Meller v. State*, 94 Nev. —, 581 P.2d 3 (1978); *State v. Rogers*, 270 S.C. 285, 242 S.E.2d 215 (1978), these cases do not state rationale which this Court finds persuasive in dealing with the facts before it. *Dobbert*, and other Supreme Court decisions discussing the ex post facto clause, *see e.g., Beazell v. Ohio, supra*, suggest that the two key areas for inquiry in the present case are the law at the time of the criminal act and the law at the time of final sentencing. The ex post facto clause only prohibits detrimental substantive alterations of the applicable law "at the time the act was committed." 269 U.S. at 169, 46 S.Ct. at 68. This Court holds that, for ex post facto purposes, the status of the death penalty between the dates of petitioners' crimes and their final sentencing was irrelevant. What is important is that petitioners were forewarned of the existence of the death penalty at the time they committed their crimes and that the procedure by which they were ultimately sentenced was constitutional.[21]

Petitioners' second argument emphasizes the difference between the death sentencing procedures of Section 13-454, as interpreted in *State v. Richmond, supra* and *State v. Bishop, supra*, and those under which they have been, or will be, sentenced. The *Dobbert* decision made it clear, however, that not all deviations from the law in effect on the date of an offense violate the ex post facto clause. *See also Beazell v. Ohio, supra; Thompson v. Missouri*, 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204 (1898); *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884). The retroactive application of a sentencing statute is permissible so long as the changes are either "procedural" or "ameliorative." *Dobbert v. Florida*, 432 U.S. at 293–94, 97 S.Ct. at 2298–99.

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[21] *See also Beazell v. Ohio*, 269 U.S 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925) (retroactive application of a statute making a defendant's right to a separate trial depend on his ability to show good cause therefore did not violate the ex post facto clause); *Thompson v. Missouri*, 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204 (1898) (statute which changed the rules of evidence after an indictment so as to render admissible against the accused evidence previously held inadmissible held constitutional); *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884) (law permitting adverse testimony of ex felon upheld even though such persons were not competent on the date of the defendant's crime).

Statutory changes are procedural if they have "neither made criminal a theretofore innocent act, nor aggravated a crime previously committed, nor provided greater punishment, nor changed the proof necessary to convict." *Id.* at 293, 97 S.Ct. at 2298. *See also Beazell v. Ohio, supra.* If a change meets this definition, the "mere fact that it may work to the disadvantage of a defendant" is irrelevant. *Id.*[22]

Similarly, an "ameliorative" change, even if substantive, is one which fails to make a statute "more onerous than the prior law." *Id.* at 294, 97 S.Ct. at 2299. In making the determination whether a change is detrimental or ameliorative, the Court stated that "we must compare the two statutory procedures *in toto* to determine if the new may be fairly characterized as more onerous." *Id.*

The only difference between the pre-*Watson* version of Section 13-454, and the statute in its reinterpreted form, is that the *Watson* decision greatly expands the sentencing court's ability to consider mitigating circumstances. The Arizona Supreme Court's changes are thus "ameliorative" at worst, and cannot be relied on to show an ex post facto violation.

Petitioners who were, or will be, resentenced pursuant to *Watson* argue that despite the ameliorative nature of the Arizona Supreme Court's reinterpretation of Section 13-454, the resentencing court's ability to consider aggravating circumstances that may have surfaced since their original death sentences were imposed[23] renders

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[22]By supplemental citation, petitioners point to the recent decision by the Supreme Court of Kentucky in *Hudson v. Kentucky*, 597 S.W.2d 610 (1980), in which the court refused to permit the retroactive application of the state's newly-enacted death penalty statute to a defendant whose crime had been committed prior to its enactment. The Hudson decision, however, was purely a matter of statutory interpretation, and is inapplicable to the present case.

[23]In *State v. Valencia*, 124 Ariz. 139, 602 P.2d 807 (1979), a post-*Watson* ruling, the Arizona Supreme Court upheld a resentencing court's decision to consider, as an aggravating circumstance, a rape conviction which had not been entered prior to the original sentencing hearing. The rape, however, had been committed prior to that hearing.

the resentencing procedure unconstitutional.[24] This argument must also be rejected.

In *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), the United States Supreme Court stated that

> the freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in *Williams v. New York*, *supra*, that a State may adopt the 'prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime.'

Id. at 723, 89 S.Ct. at 2079 (quoting *Williams v. New York*, 337 U.S. 241, 247, 69 S.Ct. 1079, 1083, 93 L.Ed 1337 (1949)). The Supreme Court's words are equally applicable in this case. The ability of a resentencing court to consider aggravating circumstances of which the original court was unaware in no way "change[s] the quantum of punishment attached to the crime." *Dobbert v. Florida*, 432 U.S. at 293–94, 97 S.Ct. at 2298–99. *See also Thompson v. Missouri*, 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204 (1898); *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884). Nor can this procedure, when compared "in toto" with the changes effected by *Watson*, be "fairly characterized as more onerous." *Id.* at 294, 97 S.Ct. at 2299. The resentencing court can consider not only a greater variety of mitigating circumstances than was permissible prior to *Watson*, but it can also consider mitigating circumstances that may have come to light since a petitioner's first sentencing.

SPEEDY SENTENCING

Several petitioners argue that the circumstances of their cases are such that resentencing pursuant to *Watson* infringed their rights

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[24]This Court considers this question only as it affects the constitutionality of *Watson's* resentencing order. The appropriateness of a particular resentencing court's use of recent aggravating circumstances within the circumstances of an individual case is properly left to separate actions.

to speedy sentencing [25] and/or due process. These arguments are based on allegations that events have transpired since petitioners were originally sentenced which make resentencing unfair. The allegations include the death or unavailability of mitigation witnesses, excessive delay, and oppressive presentence conditions. One Petitioner argues that during resentencing the court considered a prior felony conviction that, because of a plea bargain, was not considered by the original sentencing court.[26]

Without commenting on the merits of any of the above contentions, this Court concludes that petitioners' speedy sentencing and/or due process arguments would be more appropriately handled in separate actions for the reasons that resolution of such issues would require consideration of the individual circumstances of each case.

ORDER

In accordance with the above Opinion.

IT IS ORDERED that this Court's Order of May 12, 1978, enjoining respondent from imposing the death penalty is hereby vacated, and the petition for writ of habeas corpus is dismissed.

So that petitioners may have time to appeal the Court's decision in this matter,

IT IS FURTHER ORDERED that respondent is enjoined from imposing the death penalty on any of the petitioners in the above entitled and numbered cause of action for a period of sixty (60) days from the date of entry of this Order, at which time this injunction will expire without further action by this Court.

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[25] *See generally* R. MISNER, *Resentencing to Death under State v. Watson: A Denial of the Right to a Speedy Trial*, 2 Ariz.St.L.J. 137 (1979).

[26] *See* response of Petitioner Valencia.

APPENDIX C:

STATE v. WATSON,

120 Ariz. 441, 586 P.2d 1253 (1978).

Appendix C

Supreme Court of Arizona

In Banc.

No. 3089.

586 P.2d 1253

THE STATE OF ARIZONA, Appellee,

v.

SPENCER WATSON Appellant.

July 20, 1978.
Rehearing Denied Nov. 9, 1978.

Bruce E. Babbitt, Former Atty. Gen., John A. LaSota, Jr., Atty. Gen. by William J. Schafer III, Crane McClennen, Frank T. Galati, Asst. Attys. Gen., Phoenix, for appellee.

Molloy, Jones, Donahue, Trachta & Childers, P.C. by Michael J. Meehan, Tucson, for appellant.

CAMERON, Chief Justice.

This is an appeal from a sentence of death imposed after conviction and judgment of guilt to the crime of murder in the first degree, as well as a petition for review of a decision of the trial court pursuant to Rule 32 of the Rules of Criminal Procedure, 17 A.R.S., which held that the defendant was not denied a fair trial because of inadequate assistance of counsel.

We must answer four questions:

1. Is Arizona's death penalty statute, A.R.S. §§ 13-453 and 454, constitutional?

2. Was the defendant otherwise properly sentenced?

3. Was the defendant denied adequate assistance of counsel?

4. Was it error to deny defendant's request for a fingerprint expert at the Rule 32 hearing?

The facts necessary for a determination of this matter are as follows. Defendant was convicted by a jury trial of murder in the first degree, A.R.S. §§ 13-451, 452; armed burglary and burglary, A.R.S. § 13-302; robbery, §§ 13-641, 643; theft of a motor vehicle, A.R.S. § 13-672; and obstructing justice, A.R.S. § 13-541. Defendant was sentenced to death on the murder count; concurrent 99 years to life sentences on the armed burglary, armed robbery, and robbery counts; fourteen to fifteen years on the count of burglary; and time served on the theft of a motor vehicle and obstructing justice counts.

Defendant appealed, raising numerous questions and this court affirmed the convictions, *State v. Watson*, 114 Ariz. 1, 559 P.2d 121 (1976), but vacated the death sentence and remanded the matter to the trial court for resentencing.

Upon remand, the trial court held a complete hearing in mitigation and aggravation and sentenced the defendant to death. The trial court also heard the defendant's Rule 32 petition and found that the defendant was not denied effective assistance of counsel. Defendant appealed the sentencing and petitioned this court for review of the decision of the court in the Rule 32 hearing.

IMPOSITION OF THE DEATH SENTENCE

Defendant in his brief contended that the death penalty was not proper because the trial court failed to consider certain factors such as duress, youth, and intention as mitigating factors. The trial court, following the prior opinions of this court, did not consider any mitigating circumstances that were not contained in A.R.S. § 13-454(F). We have previously stated:

> "The purpose of A.R.S. § 13-454 is to confine the discretion of the sentencing authority within defined limits. We reject the defendant's construction and hold that subsection D authorizes the trial court to take into account only those mitigating circumstances enumerated in subsection F." *State v. Richmond*, 114 Ariz. 186, 195, 560

P.2d 41, 50 (1976), cert. den. 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977).

After this case was submitted to this court for decision, the United States Supreme Court, in two cases, *Lockett v. Ohio*, ____ U.S. ____, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and *Bell v. Ohio*, ____U.S. ____, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1978), struck down as unconstitutional, death penalty statutes that restricted the right of the defendant to show mitigating circumstances which might relieve the defendant of the death penalty.

[1] In *Lockett*, supra, a plurality of the United States Supreme Court stated that while its earlier opinions had not always been easy to decipher, the court had assumed, in upholding the death penalty statutes of other states, that the range of mitigating factors listed in the statute was not exclusive. The court then stated:

> "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, (footnote omitted) not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. (footnote omitted) * * *
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> * * * * * *
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> "* * * But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.
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> * * * * * *
>
> "The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant

mitigating factors." *Lockett v. Ohio*, ___U.S. ___, ___, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978).

Section F of A.R.S. § 13-454 is exclusive in that pursuant to Section D of A.R.S. § 13-454, the court may consider as mitigating circumstances only those contained therein. It is apparent that this restriction on the use of mitigating circumstances does not now pass constitutional muster. We hold that A.R.S. § 13-454(F), insofar as it limits the right of the defendant to show additional mitigating circumstances, is unconstitutional.

The next question then is whether the constitutional and unconstitutional portions of A.R.S. §§ 13-453 and 454 are severable so that the constitutional portion of the statute can remain in force and effect.

[2] Severability is a question of legislative intent. We have stated:

> " '* * * the valid part of a statute will be sustained where the valid and invalid parts are so separate and distinct that it is clear or may be presumed that the legislature would have enacted the former without the latter, if it had known of the invalidity, or, as otherwise stated, if the valid or invalid parts are not so intimately connected as to raise the presumption that the legislature would not have enacted the one without the other, the act will be upheld so far as valid. * * *'
>
> (citation omitted)
>
> * * * * * * *
>
> " 'To be capable of separate enforcement, the valid portion of an enactment must be independent of the invalid portion and must form a complete act within itself. The law enforced after separation must be reasonable in light of the act as originally drafted. The test is whether or not the legislature would have passed the statute had it been presented with the invalid features removed.' (citation omitted)" *Millett v. Frohmiller*, 66 Ariz. 339, 342–43, 188 P.2d 457, 460 (1948).

And:

> "* * * [i]t is well settled in this state that where the valid

> parts of a statute are effective and enforceable standing alone and independent of those portions declared unconstitutional, the court will not disturb the valid law if the valid and invalid portions are not so intimately connected as to raise the presumption the legislature would not have enacted one without the other, and the invalid portion was not the inducement of the act." *Selective Life Ins. Co. v. Equitable Life Assurance Society of U.S.*, 101 Ariz. 594, 599, 422 P.2d 710, 715 (1967). See also *Eastin v. Broomfield*, 116 Ariz. 576, 570 P.2d 744 (1977); *Iman v. Southern Pacific Co.*, 7 Ariz. App. 16, 435 P.2d 851 (1968).

Defendants in Arizona have always had the right to present any evidence in mitigation at the time of setencing. *State v. Hanley*, 108 Ariz. 144, 493 P.2d 1201 (1972); Rule 26.7, Rules of Criminal Procedure, 17 A.R.S. We can presume that had the legislature been aware of the unconstitutionality of the limitation on mitigating circumstances, they would have enacted the remainder of the statute without what is now the offending portion. We hold that the statute with the portion deleted remains in force and effect.

The matter will have to be remanded for sentencing at which time the defendant will be allowed to present any mitigating circumstances tending to show why the death penalty should not be imposed. This is in accord with the United States Supreme Court which has upheld the constitutionality of a capital sentencing system where any mitigating factor was to be considered by a jury. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

> "Thus, in order to meet the requirements of the Eighth and Fourteenth Amendments, a capital-sentencing authority to consider mitigating circumstances. In *Gregg v. Georgia*, we today hold constitutionally valid a capital-sentencing system that directs the jury to consider any mitigating factors * * *" *Jurek v. Texas*, 428 U.S. 262, 271–72, 96 S.Ct. 2950, 2956, 49 L.Ed.2d 929, 938 (1976).

If the trial judge finds that all the mitigating circumstances presented are "sufficiently substantial to call for leniency," then the death penalty shall not be imposed. A.R.S. § 13-454(D). Since the

rest of the statute is still in force and effect, the State will be limited to the aggravating circumstances contained in A.R.S. § 13-454(E).

WAS THE DEFENDANT PROPERLY SENTENCED?

Defendant raises other questions concerning the imposition of the death penalty. Because they undoubtedly will be raised again, we feel it appropriate to consider them at this time. Defendant specifically contends that the death penalty was not properly imposed because:

a. Defendant was denied due process by being required to prove the mitigating circumstances listed in the statute.

b. Defendant was denied Sixth Amendment rights to a jury in that the judge and not the jury determines the aggravating and mitigating factors.

c. The murder was not committed in an "especially heinous or cruel" manner.

d. Defendant did not create a grave risk to others.

e. The 1971 robbery conviction could not be an aggravating factor because there was no violence shown, no factual basis for the plea was shown, and the defendant received a minimum sentence.

f. Due process required that defendant be resentenced by a different judge.

Our statute reads:

"E. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly

created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner." A.R.S. § 13-454(E).

In making its findings of fact, the court found as aggravating factors pursuant to § 13-454(E):

"1. That the Defendant has been convicted of an offense for which a Sentence of life imprisonment or death was possible, that conviction having been on the charge of Robbery in 1971.
"2. That the Defendant was convicted of the charge of Robbery in 1971.
"3. That the victim's wife and step-daughter were also subjected to great risk of death in the instant offense."

The trial court also found that the offense was committed in an especially heinous, cruel and depraved manner. However, the aggravating circumstances of § 13-454(E)(4) and (5) were found to be inapplicable on the facts of the case.

a. Requirement that defendant prove mitigating circumstances

Defendant contends that the statute, in requiring the defendant to prove mitigating circumstances in order to reduce the sentence to life from death, shifted the burden of proof to the defendant in denial of due process.

It is true that the State has the burden of proof in a criminal case:

"* * * As we said in *Speiser v. Randall*, supra, 357 U.S. 513, at 525–526, 78 S.Ct. 1332, at 1342, 2 L.Ed.2d 1460: 'There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest

> of transcending value — as a criminal defendant his liberty — this margin of error is reduced as to him by the process of placing on the other party the burden of * * * persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of * * * convincing the factfinder of his guilt.' " *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368, 374 (1970).

Winship, supra, was concerned only with the question of innocence or guilt. When the issue of guilt is settled and only the question of punishment remains, due process is not offended by requiring the already guilty defendant to carry the burden of showing why he should receive leniency. This is not contrary to the due process requirement that the State has the burden of proof as to guilt of the defendant. In discussing affirmative defenses when sanity was a question, the United States Supreme Court stated:

> "Among other things, it is 'normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental.' (citations omitted)" *Patterson v. New York*, 432 U.S. 197, 201–02, 97 S.Ct. 2319, 2322, 53 L.Ed.2d 281, 286–87 (1977).

To require the State to negate every mitigating circumstance would place an impermissible burden on the State. We do not believe it offends due process to require the defendant to show such mitigating circumstances.

b. Right to jury trial

But defendant contends that allowing the judge to determine the mitigating and aggravating circumstances and not the jury is a denial of defendant's Sixth Amendment right to trial by jury. We do not agree. This argument was rejected by the United States Supreme Court in reviewing a similar statute from Florida:

> "The basic difference between the Florida system and the Georgia system is that in Florida the sentence is determined by the trial judge rather than the jury. This Court has pointed out that jury sentencing in a capital case can perform an important societal function, *Witherspoon v. Illinois*, 391 U.S. 510, 519, n. 15, 88 S.Ct. 1770, 1775, 20 L.Ed.2d 776, but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases. (footnote omitted." *Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, 49 L.Ed.2d 913, 922–23 (1976).

c. Was the crime heinous, cruel and depraved

Defendant next contends that the finding that the defendant committed the offense in an especially heinous, cruel and depraved manner was erroneous based upon the facts in this case.

In *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976), cert. den. 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977), this court cited with approval from the Florida Supreme Court as follows:

> "* * * It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies — the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973). See also *Halliwell v. State*, 323 So.2d 557 (Fla.1975).

The Florida statute has sustained attack in the federal court. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Viewing the facts in a light most favorable to upholding the finding of the trial court, *State v. Ceja*, 115 Ariz. 413, 565 P.2d

1274 (1977), cert. den. 434 U.S. 975, 98 S.Ct. 533–34, 54 L.Ed.2d 467 (1977), it appears that the defendant went upstairs with a gun and that while the defendant was upstairs, the victim obtained his own gun and began shooting at the codefendant, Reid. The defendant came back downstairs and shot the victim in the back four times, the last time while the victim was face down on the floor. Because this was a shoot-out between the victim and the two robbers, we do not feel that the shooting was accomplished in such a manner as to set it apart from the norm of first degree murders, that is the "conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon*, supra; *State v. Richmond*, supra.

Although this murder is, as is any murder, shocking, the conduct of the defendant does not comply with the legislative intent. We do not believe that the killing of the defendant was in a particularly heinous, cruel or depraved manner as contemplated by the statute and that aggravating factor number 6 of A.R.S. § 13-454(E) was not shown.

d. Grave risk to others

Defendant next contends that the offense was not committed by the defendant knowingly creating "a grave risk of death to another person or persons in addition to the victim of the offense." At the time of the shooting, the victim's wife and daughter had both left the house. The State in its brief concedes that aggravating circumstance number 3 was not shown and we agree.

e. Prior felony conviction

Defendant was convicted in 1971 of a felony robbery. A state may not use a prior conviction to enhance punishment for a later conviction if the prior conviction was obtained in a constitutionally infirm manner. *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967).

Defendant contends that this prior conviction should not have been used as a basis for aggravating circumstances 1 and 2 because (1) there was no factual basis for the plea, (2) the plea was not intelligently made, (3) there was no violence shown, and (4) the defendant received the minimum sentence.

North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) requires that the court establish a factual basis

for a plea of guilty before it is constitutionally acceptable. We have read the reporter's transcript of the plea of guilty to the prior felony. We believe that there is a sufficient factual basis for such plea. We find no error.

Defendant further contends, however, that the plea was not intelligently made pursuant to *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), and therefore was invalid because no one told him at the time that it might be used to impose the death penalty if he was later convicted of murder. Again, we do not agree. There is a limit as to the range of consequences that follows from a plea of guilty that must be told to the defendant at the time of the plea. Defendant need only be told the immediate consequences of his plea. The court need not assume that defendant is contemplating a later murder when the plea of guilty is entered so as to require that he tell him if he does commit the murder the felony to which he is pleading guilty could cause the death penalty to be imposed.

Defendant further contends that there was no showing of force and fear in the 1971 robbery conviction. We do not agree. Fear of force is an element of robbery and the conviction of robbery presumes that such fear was present.

Defendant further contends that since he received only the minimum sentence, the prior conviction may not be used. Again we do not agree. It is the nature of the prior conviction and the sentence possible that is the aggravating circumstance in paragraphs 1 and 2 of Section E — the sentence actually imposed is not controlling although it might be presented as a mitigating factor. We believe the trial court was correct in finding aggravating circumstances 1 and 2.

f. Resentencing by the judge

This court in the previous case of *State v. Watson*, supra, remanded the matter for resentencing because of the failure to disclose portions of the presentence report. We stated:

> "In the instant case, the trial court did not state why certain portions of the presentence report were excised and neither did it indicate that it was not considering that material in imposing sentence, here a sentence of death.

> It is thus impossible to determine from the record whether or not the provisions of A.R.S. § 13-454 were complied with. In light of the specific requirements imposed by that statute and the severity of the punishment involved, we believe that this matter must be remanded for a new hearing and resentencing." *State v. Watson*, supra, 114 Ariz. at 13, 559 P.2d at 133.

Upon remand, the same judge sentenced the defendant. Defendant contends that this was error in that the judge, after viewing the extraneous and prejudicial matters in the presentence reports, could not fairly and impartially sentence the defendant. We do not agree.

Section B of 13-454 states as follows:

> "B. In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances set forth in subsection E or F. * * *."

Even though the trial judge at the resentencing was careful to state that he did not consider these matters, it is apparent that the defendant had available to him the same information the trial court possessed and that the defendant had a chance to contest it. The only aggravating circumstance which we have held to be applicable to the imposition of the death sentence in this case is the prior felony conviction, and we find no error in the information received by the court in considering that factor.

We find no error.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his first appeal, defendant raised the issue of ineffective assistance of counsel both in his direct appeal and in a motion under Rule 32. Although it was held that assistance of counsel had been adequate for the purposes of the direct appeal, it was also held that the allegations of defendant's motion under Rule 32 made out a

colorable claim under Rule 32.6 and the cause was remanded for an evidentiary hearing on the question of the adequacy of representation by trial counsel. We stated:

> "Even though we have held herein that based upon the record on appeal that the defendant has not shown a denial of adequate counsel, this does not mean that at a hearing on the Rule 32 motion he may not be able to show ineffective assistance of counsel such as would bring him under the cases on this subject. In short, we believe that this Rule 32 motion raises a colorable claim of ineffective assistance of counsel which cannot be summarily disposed of without hearing and full factual determination." *State v. Watson*, supra, 114 Ariz. at 15, 559 P.2d at 135.

At the hearing, the defendant, his trial attorney, an investigator from the attorney's office, and Mrs. Lucinda Watson, the defendant's mother and a potential witness, testified about the pretrial investigation. The trial court found that there was insufficient evidence to support the defendant's allegations that his trial counsel had inadequately prepared the case for trial. In this appeal, defendant claims that there was sufficient evidence to show that the trial counsel inadequately prepared the case, in that counsel did not pursue certain information given to him by defendant and that the failure was so great as to be a violation of defendant's constitutional right to be represented by counsel under the Sixth Amendment of the United States Constitution. *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). Specifically, defendant alleges that the evidence shows that the trial counsel failed to adequately investigate a potential alibi and the witnesses who would have supported it; to investigate the possibility that a fingerprint exemplar supposedly taken from the defendant was, in fact, not his; and to confer adequately with his client about the case as it progressed.

In order to succeed at the hearing, the defendant had the burden of proof in regard to facts supporting his allegations. Rule 32.8(c), Rules of Criminal Procedure, 17 A.R.S.; *State v. Stice*, 23 Ariz. App. 97, 530 P.2d 1130 (1975). To show ineffective assistance of counsel, the defendant had to show that the original trial had been reduced to a sham or a farce. That is, the defendant had to do more than show that his counsel had been unsuccessful or had made tactical errors. *State v. Watson*, supra. See also *State v. Tellez*, 111

Ariz. 34, 523 P.2d 62 (1974); *State v. Daniel*, 25 Ariz.App. 592, 545 P.2d 440 (1976). Here the trial on its face was not a sham or farce; it was aggressively tried by the trial counsel who presented legitimate defenses and made reasonable challenges to the evidence presented by the State. Therefore, in order to show that the preparation for an otherwise adequate trial was insufficient, defendant had to show that counsel's failure to investigate resulted in not presenting evidence or interposing a defense which would have made a crucial difference to the case at the trial. Compare *State v. Lopez*, 3 Ariz.App. 200, 412 P.2d 882 (1966).

From the record of the hearing on the Rule 32 motion, it is apparent that the defendant failed to meet his burden of proof. In regard to the alibi witnesses, the trial counsel said that a review of his notes indicated that he had made some attempt to contact the suggested witnesses and that they were either unavailable or unsuitable in some way. His testimony was essentially confirmed by the investigator from his office who did recall attempting to find some of the witnesses. The defendant's own testimony also confirmed the trial attorney's recollection; the defendant testified that counsel told him that some of the alibi witnesses could not be used even though available because their credibility would be brought into question since they were on trial or subject to pending charges. The tactical decision not to call the alibi witnesses also applied to the question of calling the defendant's mother. As a close relative of the defendant, her credibility would be limited. In addition, here her testimony would not have clearly established an alibi as she claimed to have last seen the defendant when he awakened her at approximately 10:00 p.m. on the night in question. This was well after the first incident and about half an hour before the second incident leading to the present charges and convictions. Counsel also stated that he was reluctant to put her on the stand because there had been inconsistencies in the statements which she had given to him and to the County Attorney.

The trial counsel did not specifically remember any discussions with the defendant about the possibility that the fingerprint exemplar was not the defendant's. Defendant claims that the exemplar, which was matched to prints found at the scene, was not his because the finger in question had a scar which would have left an open space on the exemplar. Counsel said that he had arrived at the police

station shortly after the prints were taken and assumed that they were defendant's. The officer who took the prints also testified at the trial as to taking them from the defendant. It is significant that at the Rule 32 hearing, defendant presented no evidence that such a scar did, in fact exist, or that it would have made a difference in the outcome of the case.

The record for both the Rule 32 hearing and the trial indicates that counsel spent an adequate amount of time conferring with defendant to prepare the case. Again, the issue here is not whether the defendant is satisfied with the number of times that counsel conferred with him or that counsel followed all of his suggestions, but that there were sufficient meetings for counsel to apprise the defendant of the progress of the case and to represent him adequately.

Analysis of the record indicates that the defendant did not meet his burden of proof in showing sufficient facts to demonstrate that the preparation done by his trial counsel rendered his trial a sham or a farce. Rule 32.8(c), Rules of Criminal Procedure, 17 A.R.S. We find no error.

FINGERPRINT EXPERT

In proceedings held before the evidentiary hearing on the motion under Rule 32, defendant's new counsel made a motion for the appointment of a fingerprint expert in regard to the defendant's claim that the exemplar was not his. The motion was made orally and counsel promised that a written motion would follow. No written motion was ever filed. Defendant now claims that it was clear that a written motion would have been denied and that to deny the appointment of such an expert for an indigent client was fundamental error.

It is true that A.R.S. § 13-1673 authorizes the appointment of such experts in criminal cases. However, the question of whether the denial of the appointment of such an expert is a violation of due process and of the statute turns on whether there were good reasons for the appointment. Such reasons did not exist in this case. Although a fingerprint expert might ultimately have been necessary to compare a second exemplar submitted by the defendant to show the alleged

scar, no second exemplar was submitted. Without the exemplar as an indication of the validity of the defendant's claim, there was no reason for the court to appoint an expert.

Judgment of conviction affirmed; remanded to the trial court for resentencing pursuant to this opinion.

STRUCKMEYER, V. C. J., and HAYS, HOLOHAN and GORDON, JJ., concur.

MOTION FOR REHEARING DENIED

SUPPLEMENTAL OPINION

CAMERON, Chief Justice.

This is a motion for rehearing of a previous decision and opinion of this court. See *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978). Defendant contends in this motion that we did not properly dispose of his allegation that he received ineffective assistance of counsel at the trial, that the Arizona death penalty statute is unconstitutional because of lack of jury participation in sentencing and because an improper burden of persuasion is placed upon the defendant, and that we misconstrued his arguments concerning his prior conviction. These matters were briefed, argued, and disposed of in the prior opinion and we do not feel it is necessary to consider them again.

Two other questions were also raised in this motion for rehearing. Because these matters were neither briefed nor argued prior to our opinion of 20 July 1978, we considered the motions and memoranda of the parties and granted defendant's motion for oral argument. The questions are:

1. Is the death penalty statute in Arizona severable?

2. Does the reimposition of the death penalty under the procedures newly devised after Watson's trial and sentencing violate the

(a) double jeopardy and

(b) ex post facto

provisions of the United States and Arizona Constitutions?

The facts necessary for a determination of this matter on appeal are as follows. Defendant was convicted in a jury trial of murder in the first degree, A.R.S. §§ 13-451, 452; armed burglary and burglary, A.R.S. § 13-302; robbery, §§ 13-641, 643; theft of a motor vehicle, A.R.S. § 13-672; and obstructing justice, A.R.S. § 13-541. Defendant was sentenced to death on the murder count; concurrent 99 years to life sentences on the armed burglary, armed robbery, and robbery counts; fourteen to fifteen years on the count of burglary; and time served on the theft of a motor vehicle and obstructing justice counts.

Defendant appealed raising numerous questions and this court affirmed the convictions, *State v. Watson*, 114 Ariz. 1, 559 P.2d 121 (1976), but vacated the death sentence and remanded the matter to the trial court for resentencing.

Defendant was resentenced to death and defendant again appealed. This court, in *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), following the United States Supreme Court cases of *Lockett v. Ohio*, ____U.S. ____, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and *Bell v. Ohio*, ____U.S. ____, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1978), held that the restriction in the showing of mitigating circumstances in the sentencing provisions of our death penalty statute, Section (D) of 13-454, was unconstitutional. We stated:

> "Section F of A.R.S. § 13-454 is exclusive in that pursuant to Section D of A.R.S. § 13-454, the court may consider as mitigating circumstances only those contained therein. It is apparent that this restriction on the use of mitigating circumstances does not now pass constitutional muster. We hold that A.R.S. § 13-454(F), insofar as it limits the right of the defendant to show additional mitigating circumstances, is unconstitutional." 120 Ariz. at 444, 586 P.2d at 1256.

We then held that the statute remained in full force and effect and that only the portion limiting the factors in mitigation should be set aside. The matter was then remanded for resentencing pursuant to the opinion which allowed the defendant the right to present any

mitigating factors he wished to present at the resentencing. From this opinion defendant filed the instant motion for rehearing.

SEVERABILITY OF THE STATUTE

Defendant first contends that the statute, A.R.S § 13-454, cannot be severed because the "legislature neither intended a capital sentencing procedure without mitigating factors, nor is the statute workable without it."

We agree that the statute would not be constitutional without the provision allowing the defendant to present mitigating factors. We also agree that the legislature did intend that the defendant be allowed to present mitigating factors. What the legislature did, however, was to limit the number of mitigating factors that could be presented by the defendant and it was this limitation that we held was unconstitutional under *Lockett* and *Bell*, supra. The statute, with the addition of the amount of mitigating factors that may be presented, is still a workable statute even though shorn of its unconstitutional limitations.

But defendant also contends that two questions must be answered before an unconstitutional statute may be severed from the remainder and the remainder allowed to remain in force and effect. First, it must be apparent that the legislature intended severability, and second, the invalid portion must be sufficiently independent from that which remains to permit the latter to function separately.

We believe defendant has misread the law and our opinion in this matter. The only way a court can be sure that the legislature intended severability is by the existence of a severability clause in the statute itself. When that is the case, there is no question that severability is intended. It is only when the statute is silent as to severability that a problem arises. In those cases:

> "If the objectionable parts of a statute are severable from the rest in such a way that the legislature would be presumed to have enacted them independently, the failure of the latter will not necessarily render the other parts of the statute invalid. * * * " *State ex rel. Berger v. Superior Court*, 106 Ariz. 365, 370, 476 P.2d 666, 671 (1970).

The general rule in Arizona is:

> "* * * if part of an act is unconstitutional and by eliminating the unconstitutional portion the balance of the act is workable, only that part which is objectionable will be eliminated and the balance left intact. (citations omitted)" *State v. Coursey*, 71 Ariz. 227, 236, 225 P.2d 713, 719 (1950).

This is in accord with the general rule concerning unconstitutional portions of a statute:

> "A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional." Cooley, Constitutional Limitations, Vol. 1 at page 360 (8th ed., Little & Brown Co.).

We believe there is sufficient evidence in the legislative history of the enactment of this statute as well as the statute itself from which is is apparent that had the legislature anticipated that the legislation on mitigating factors would be found unconstitutional they would still have enacted the rest of the statute. Indeed, there is more than ample indication that the legislature intended a death penalty statute and were prepared to write one that complied with the United States constitutional guidelines. That they faltered in one portion of the statute is hardly the fault of the legislature considering the lack of direction given by a series of confusing and indecisive opinions of the United States Supreme Court. See *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). We find the severability was proper in this case.

Defendant finally points to Chapter 138, Laws of 1973, Section 10. This provision is not contained in the bound volumes of the Arizona Revised Statutes. It is, however, a part of the legislation passed in 1973. The provision reads:

> "In the event the death penalty is held to be unconstitutional on final appeal, a person convicted of first degree murder or another offense punishable by death who has been sentenced to die shall be resentenced by the sentencing court to life imprisonment without possibility of parole until the person has served a minimum of twenty-five calendar years." Sec. 10, Ch. 138, Laws 1973.

Defendant contends that since we have found the death penalty unconstitutional, we therefore must sentence the defendant to twenty-five years. We do not agree.

We did not find the death penalty to be unconstitutional. We held only that in determining the death penalty there are certain factors which, if presented by the defendant, the court must consider. The statute, as severed, is valid.

CONSTITUTIONALITY OF THE IMPOSITION OF THE DEATH PENALTY

a. Double jeopardy

Defendant next contends that remanding the case for new sentencing violates his Fifth and Fourteenth Amendment privilege against being placed twice in jeopardy. There is no doubt that the double jeopardy clause applies to sentencing as well as conviction, *Ex parte Lange*, 18 Wall. 163, 85 U.S. 163, 21 L.Ed. 872 (1873), and defendant cites several cases, to from California, *People v. Harvey*, 76 Cal.App.3d 441, 142 Cal.Rptr. 887 (1978) and *People v. Payne*, 75 Cal.App.3d 601, 142 Cal.Rptr. 320 (1977), as well as the South Carolina case of *State v. Rodgers*, 242 S.E.2d 215 (S.C.1978) in support of his position. All three of these cases are distinguishable. In each of those cases, the defendants, after having been sentenced to death, had their sentences reduced to life imprisonment. After they had commenced to serve the life sentences, the state sought to have them resentenced under legislation enacted after the crime and the reversal. Thus, after the life sentences were at least partially served, the state attempted to subject them to another different and higher punishment. The California court said in *Harvey*, supra, that when a new death penalty statute was enacted in August of 1977 and the state sought to have the case returned to the trial court for resentencing under the valid 1977 statute, it

was double jeopardy. We agree with the California court, but these cases are clearly distinguishable and do not apply to the case at bar. The defendant in the instant case never served his sentence (of death). His death sentence was not reduced to life imprisonment but was merely set aside pending resentencing. We find no violation of the double jeopardy clause in the instant case. See also *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

b. Ex post facto law

Defendant also contends that this court's action is improper because it is an ex post facto law. We believe that the United States Supreme Court has disposed of this matter as follows:

"Petitioner's second ex post facto claim is based on the contention that at the time he murdered his children there was no death penalty 'in effect' in Florida. This is so, he contends, because the earlier statute enacted by the legislature was, after the time he acted, found by the Supreme Court of Florida to be invalid under our decision in *Furman v. Georgia*, supra. Therefore, argues petitioner, there was no 'valid' death penalty in effect in Florida as of the date of his actions. But this sophistic argument mocks the substance of the ex post facto clause. * * * The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State ascribed to the act of murder

"Petitioner's highly technical argument is at odds with the statement of this Court in *Chicot County Drainage District v. Bank*, 308 U.S. 371, 375, 60 S.Ct. 317, 319, 84 L.Ed. 329:

> 'The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. (citations omitted) It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored.' 308 U.S., at 374, 84 L.Ed. 329, 60 S.Ct. 317.

"There the existence of the statute served as an 'operative fact' to warn the petitioner of the penalty which Florida would seek to impose on him if he were convicted of first-degree murder. This was sufficient compliance with the ex post facto provision of the United States Constitution." *Dobbert v. Florida*, 432 U.S. 282, 297–98, 97 S.Ct. 2290, 2300, 53 L.Ed.2d 344, 358–59 (1977).

In the instant case, we are only concerned with a procedural change and one which increases the rights of the defendant in death penalty cases. We do not believe there is an ex post facto problem. We find no error.

DUE PROCESS AND CRUEL AND UNUSUAL PUNISHMENT

Defendant also contends in the motion for rehearing that there was a violation of due process and of the cruel and unusual punishment provisions of the United States Constitution. Defendant did not pursue this position in his brief, cited no authority in support of his contention and we found none. We find no error.

Motion for rehearing denied.

STRUCKMEYER, V. C. J., and HAYS, HOLOHAN and GORDON, JJ., concur.

APPENDIX D:

U.S. CONST. ART 1 § 10.

Appendix D

U.S. CONST. ART. 1 § 10:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

APPENDIX E:

U.S. CONST. AMEND. V.

Appendix E

U.S. CONST. AMEND. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F:

U.S. CONST. AMEND. VIII.

Appendix F

U.S. CONST. AMEND. VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

APPENDIX G:

U.S. CONST. AMEND. XIV § 1.

Appendix G

U.S. CONST. AMEND. XIV § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H:

Ariz. Rev. Stat. § 13–483.

Appendix H

Ariz. Rev. Stat. § 13-453.

A. A person guilty of murder in the first degree shall suffer death or imprisonment in the state prison for life, without possibility of parole until the completion of the service of twenty-five calendar years in the state prison, as determined by and in accordance with the procedures provided in § 13-454.

B. A person guilty of murder in the second degree shall be punished by imprisonment in the state prison for not less than ten years. As amended Laws 1973, Ch. 138, § 2.

APPENDIX D

Ariz. Rev. Stat. § 13-604.

Appendix I

Ariz. Rev. Stat. §13-454:

A. When a defendant is found guilty of or pleads guilty to first degree murder, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in subsection E and F, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

B. In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances set forth in subsection E or F. Any information relevant to any of the mitigating circumstances set forth in subsection F may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection E shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances set forth in subsections E and F. The burden of establishing the existence of any of the circumstances set forth in subsection E is on the prosecution. The burden of establishing the existence of the circumstances set forth in subsection F is on the defendant.

C. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection E and as to the existence or nonexistence of each of the circumstances in subsection F.

D. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall take into account the aggravating and mitigating circumstances enumerated in subsections E and F and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection E and that there are no mitigating circumstances sufficiently substantial to call for leniency.

E. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner.

F. Mitigating circumstances shall be the following:

1. His capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of

law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. He was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. He was a principal, under § 13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person. Added Laws 1973, Ch. 138, § 5.

APPENDIX 3:

Ariz. Rev. Stat. § 13-703.

Appendix J

Ariz. Rev. Stat. § 13-703.

Sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years

A. A person guilty of first degree murder as defined in § 13-1105, shall suffer death or imprisonment in the custody of the department of corrections for life, without possibility of parole until the completion of the service of twenty-five calendar years, as determined and in accordance with the procedures provided in subsections B through G of this section.

B. When a defendant is found guilty of or pleads guilty to first degree murder as defined in § 13-1105, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsections F and G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

C. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances included in subsection F or G of this section. Any information relevant to any mitigating circumstances included in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissiblity under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules governing the admission of evidence

at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

D. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection G of this section.

E. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall take into account the aggravating and mitigating circumstances included in subsections F of this section and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant

knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner.

7. The defendant committed the offense while in the custody of the department of corrections, a law enforcement agency or county or city jail.

G. Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause,

or would create a grave risk of causing, death to another person.

5. The defendant's age.

Amended by Laws 1979, Ch. 144, § 1, eff. May 1, 1979.

APPENDIX K:

1973 ARIZ. SESS. LAWS CH. 138 § 10.

Appendix K

1973 ARIZ. SESS. LAWS CH. 138 § 10:

In the event the death penalty is held to be unconstitutional on final appeal, a person convicted of first degree murder or another offense punishable by death who has been sentenced to die shall be resentenced by the sentencing court to life imprisonment without possibility of parole until the person has served a minimum of twenty-five calendar years.

APPENDIX L:

SPECIAL VERDICT, ORIGINAL SENTENCING OF PAUL WILLIAM JORDAN:

Appendix L

**Minute Entry dated March 13, 1975,
Honorable Harold Martin, Div. 16**

CR-84940

STATE OF ARIZONA	County Attorney: Vincent Tolino
vs.	Public Defender Michael Sullivan
PAUL WILLIAM JORDAN	Adult Probation Department County Jail

9:00 A.M. This is the time regularly fixed for sentence. Deputy County Attorney Vincent Tolino present for the State; Defendant, Paul William Jordan, present with counsel, Public Defender Michael Sullivan; Court Reporter Goldie Wetter present.

You have been charged by the State of Arizona with the crime of Homicide, First Degree, a felony. To this charge you were found guilty by a Jury. Do you have anything to say or legal cause to show why sentence should not now be pronounced?

No legal cause appearing to the Court and by reason of the Verdict of the Jury, the Court enters the following judgment and sentence:

In accordance with A.R.S. § 13-453 and A.R.S. § 13-454, it is the Special Verdict of this Court that as to Aggravation:

1. The Defendant has been convicted of another offense in the United States, for which, under Arizona Law, a sentence of life imprisonment was impossible.

2. The defendant was previously convicted of felonies in the United States involving the use or threat of violence on another person.

3. In the commission of the offense, the Defendant did not create a grave risk of death to another person or persons, in addition to the victim of the offense.

4. Defendant did not procure the commission of this offense by payment, or promise of payment, of anything of pecuniary value.

5. The Defendant did not commit the offense as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value, unless the money taken in the robbery be considered as falling within the category of this section.

6. The Defendant did not commit the offense in an especially heinous, cruel or depraved manner, in so far as the Court can determine, without the testimony of any eyewitnesses other than the victim.

As to Mitigation:

1. The Defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was not significantly impaired, and certainly not so as to constitute defense to prosecution.

2. The Defendant was not under unusual and substantial duress and not such as to constitute a defense to prosecution.

3. He was a principal in the offense.

4. He could reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause or would create a grave risk of causing, death to another person, and especially, Defendant could have foreseen the death of Abraham Osso.

In determining what the sentence for Defendant should be, the Court has:

1. Considered the prior convictions and the nature of the crimes in those convictions, in the State of Texas.

2. Considered the entire testimony and evidence presented and admitted at the Jury trial.

3. Considered the Motion for New Trial filed on the Defendant's behalf.

4. Considered the statements made by the Defendant at the trial and at the mitigation hearing.

5. Considered the statements made by both Counsel at the required hearing on March 12, 1975.

Wherefore, the Court has concluded that there are one or more of the Aggravating Circumstances enumerated in Subsection E, of A.R.S., § 13-454 and that there are no mitigating circumstances sufficiently substantial to call for leniency under Subsection F, of A.R.S., § 13-454.

Based on the determination of guilt made by the Verdict of the Jury on February 26, 1975.

IT IS the judgment of the Court that the defendant, Paul William Jordan, is guilty of the crime of Murder, First Degree, a felony.

IT IS ORDERED that the defendant, Paul William Jordan, be punished for this crime by death, by the administration of lethal gas, in the lethal gas chamber, within the walls of the Arizona State Prison at Florence, Arizona, in the manner as provided by law.

IT IS ORDERED that the Defendant is remanded to the custody of the Sheriff of Maricopa County and the Sheriff is Ordered to deliver the Defendant to the Superintendent of the Arizona State Prison at Florence, Arizona, together with a signed, certified copy of this judgment and sentence, within ten (10) days from today's date.

IT IS FURTHER ORDERED that the Court Reporter prepare a certified copy of the necessary records and Reporter's Transcript on Appeal, to be furnished at no cost to the Defendant.

IT IS FURTHER ORDERED directing the Clerk of the Superior Court of Maricopa County to file a Notice of Appeal from this judgment and sentence.

Counsel for the Defendant informs the Court that the Defendant requests that he be allowed to make two phone

calls and that he be taken to the Arizona State Prison at Florence, Arizona, as soon as possible.

The Court requests the Sheriff to allow Mr. Jordan to make the phone calls requested.

Harold D. Martin, Judge.

APPENDIX 14:

SPECIAL VERDICT, RESENTENCING OF PAUL WILLIAM JORDAN:

Appendix M

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,
Plaintiff,

vs

PAUL WILLIAM JORDAN,
Defendant.

NO. CR84940

SPECIAL VERDICT

Defendant Paul William Jordan was found guilty of murder, first degree, by a jury which returned a guilty verdict on February 26, 1975. Judgment of conviction was rendered on March 13, 1975. By order of the United States Supreme Court a new sentencing hearing was conducted on December 15, 1978, pursuant to the provisions of A.R.S. Sections 13-453 and 13-454 for the purpose of determining the sentence to be imposed.

Both the State and the Defendant were allowed to present any information or evidence going towards aggravation or mitigation on the matter of sentence.

The State chose to rest upon the information in the file, the evidence at trial and all evidence presented to date on aggravation.

The Defendant offered all prior evidence and presented testimony and exhibits as to mitigation.

Both parties were allowed to cross examine or present any witnesses they desired.

The prosecution and the Defendant were given the opportunity to present rebuttal and each further was given fair opportunity to present argument as to the adequacy of

the information to establish the existence of any of the circumstances set forth in A.R.S. Section 13-454, or of any mitigating circumstances of any nature whatsoever which might relieve the Defendant of the death penalty.

The Court recognizes that the Supreme Court of the State of Arizona, in *State v. Watson*, Supreme Court Cause No. 3089, filed July 20, 1978, has held A.R.S. Section 13-454(f) unconstitutional insofar as it purports to limit the right of the Defendant to show additional mitigating circumstances. This Court also recognizes, however, that the Court in *Watson* also held the unconstitutional portion of the statute to be severable and that the Arizona death penalty is, therefore, constitutional, provided the trial court considers anything which might be offered in mitigation on the subject of the penalty. Accordingly, the Court has proceeded on the basis of the *Watson* case, including the supplemental opinion handed down on November 9, 1978 by the Arizona Supreme Court.

Based on presentation of information at the presentencing hearing and the evidence admitted at the trial of this case, the Court makes the following findings as to the existence or non-existence of each of the aggravating circumstances enumerated in Subsection (E) of A.R.S. Section 13-454 and as to the existence or non-existence of any mitigating circumstances which the Defendant presented, whether or not mentioned in A.R.S. Section 13-454(E).

The Court renders the following findings with respect to the permissible aggravating circumstances enumerated in A.R.S. 13-454(E).

1. (Whether) the Defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment was imposable?

FINDING: The Court finds that this circumstance *does* exist. In Cause No. 74-06-01173 entitled the State of Texas versus Paul William Jordan, in Criminal District Court No. 4 of Tarrant County, Texas, the Defendant on October 9, 1974 was found guilty, pursuant to his plea of guilty, of the crime of robbery by assault, a felony, and was sentenced to

serve not less than five (5) years nor more than twenty (20) years therefor.

The crime of robbery in the State of Arizona on October 9, 1974 carried a possible sentence of up to life imprisonment. Defendant has therefore been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment was then imposable.

In Cause No. 74-06-01170 entitled the State of Texas versus Paul William Jordan, in Criminal District Court No. 4 of Tarrant County, Texas, the Defendant on February 4, 1974 was found guilty pursuant to his plea of guilty, of the crime of aggravated robbery, a felony, and was sentenced to serve not less than five (5) nor more than twenty (20) years.

The crime of robbery in the State of Arizona on February 4, 1974 carried a possible sentence of up to life imprisonment. Defendant has therefore been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment was then imposable.

In Cause No. 7173 entitled the State of Texas versus Paul William Jordan, in District Court of Erath County, Texas, the Defendant on June 10, 1974 was found guilty, pursuant to a trial by jury of twelve persons, of the crime of aggravated robbery, a felony, and was sentenced to serve not less than five (5) nor more than eighty-five (85) years on June 27, 1974.

The crime of robbery in the State of Arizona on June 10, 1974 carried a possible sentence of up to life imprisonment. Defendant has therefore been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment was then imposable.

In Cause No. 7866, entitled the State of Texas versus Paul William Jordan, in District Court of County of Parker, Texas, the Defendant on May 22, 1974 was found guilty, pursuant to a trial by jury of twelve persons, of the crime of aggravated robbery, a felony, and was sentenced to serve

not less than five (5) nor more than twenty (20) years on June 3, 1974.

The crime of robbery in the State of Arizona on June 3, 1974 carried a possible sentence of up to life imprisonment. Defendant has therefore been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment was then imposable.

Therefore, the Court finds that the aggravating circumstance specified in A.R.S. Section 13-454(E)1 *does* exist.

2. (Whether) the Defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person?

FINDING: The Court finds that this circumstance *does* exist. The Court finds that the convictions listed in Finding No. 1 also apply to No. 2. Therefore, the Court finds that the aggravating circumstance specified in A.R.S. Section 13-454(e)2 *does* exist.

3. (Whether) in the commission of the offense the Defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense?

FINDING: The Court finds that this circumstance *does not* exist.

4. (Whether) the Defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value?

FINDING: The Court finds that this circumstance *does not* exist.

5. (Whether) the Defendant committed the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value?

FINDING: The Court finds that this circumstance *does* exist, since the Defendant committed the crime of murder during the commission of a robbery.

6. (Whether) the Defendant committed the offense in an especially heinous, cruel or depraved manner?

FINDING: The Court finds that this circumstance *does* exist in that the Defendant in a depraved manner, ruthlessly and without cause shot the victim in what the Defendant believed to be the victim's stomach which could produce a cruel and lingering suffering before death. The Defendant also believed the victim to be still alive but departed with no attempt to help the victim or (then or later) notify anyone of the victim's plight in order to perhaps save the victim's life, showing a complete and depraved disregard for human life.

The Court renders the following findings with respect to possibly mitigating circumstances, whether specified in A.R.S. Section 13-454(F) or not:

1. (Whether) his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

FINDING: The Court finds this circumstance *does not* exist. There is no evidence that the Defendant suffers from any mental or physical condition or impairment. There is evidence that the Defendant had consumed alcohol prior to the crime. There was testimony at the aggravation and mitigation hearing as to Defendant's consumption of alcohol and or drugs at the time of the offense or shortly before. This evidence was introduced for the first time at the aggravation and mitigation hearing although allegedly available at the time of the trial. The Court finds this testimony incredible, contrived and unworthy of belief and the Defendant's statement made to investigating officers shows that he was in complete control of all his faculties at the time of the offense and this evidence is not contradicted. The Court finds that any consumption of alcohol was not such as to significantly impair his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

2. (Whether) he was under unusual and substantial duress, although not such as to constitute a defense to prosecution?

FINDING: The Court finds that this circumstance *does not* exist.

3. (Whether) he was a principal under A.R.S. Section 13-452 in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution?

FINDING: The Court finds that this circumstance *does not* exist.

4. (Whether) he could reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person?

FINDING: The Court finds that this circumstance *does* exist.

5. The Court finds that the Defendant's age is not a mitigating factor. The Court further finds the Defendant's date of birth to be August 11, 1939.

6. The Court finds that the Defendant's health is not a mitigating factor.

7. The Court has reconsidered the trial evidence to see whether any other mitigating circumstance exists, and finds none.

8. The Court has considered all information and evidence proferred by the Defendant at the presentence hearing and finds no other mitigating circumstances therein.

DATED this 20th day of December, 1978.

HAROLD D. MARTIN,
Superior Court Judge
Division 15

APPENDIX N:

JUNE 28, 1982 Order

Appendix N

FILED -
Jun 28 1982
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

United States Court of Appeals
The Ninth Circuit

JOHN HENRY KNAPP, Arizona State Prison Inmate No. 33659, and all inmates of the Arizona State Prison similarly situated,

Petitioners-Appellants,

No. 80-5419
ORDER

vs.

HAROLD CARDWELL, et al.,

Respondents-Appellees.

BEFORE: MERRILL, ADAMS*, and SNEED, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing.

The full court was advised of the suggestion for en banc rehearing; a request was made that a vote be taken on the suggestion; and the court determined not to take the case en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable Arlin M. Adams, United States Circuit Judge for the Third Circuit, sitting by designation.

Office - Supreme Court, U.S.
FILED
OCT 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-530

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JOHN HENRY KNAPP, Arizona State Prison Inmate No. 33659, and all inmates of the Arizona State Prison similarly situated,

Petitioners,

vs.

HAROLD CARDWELL, et al.,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. HAVE THE FEDERAL COURTS BELOW SO MISCONSTRUED THE NATURE OF THE ARIZONA SUPREME COURT'S ACTION IN REINTERPRETING THE ARIZONA CAPITAL PUNISHMENT STATUTE THAT THOSE FEDERAL COURTS HAVE ERRED IN FINDING CONSTITUTIONAL THE DEATH SENTENCES IMPOSED IN RESENTENCINGS NECESSITATED BY THAT REINTERPRETATION?

2. DO THE RESENTENCINGS TO DEATH VIOLATE EITHER THE DOUBLE JEOPARDY CLAUSE OR EX POST FACTO CLAUSE, ESPECIALLY IN LIGHT OF BULLINGTON v. MISSOURI?

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REASONS FOR DENYING THE WRIT

I. THIS CASE HAS NEITHER THE IMPORTANCE NOR THE IMMEDIACY PETITIONERS SEEK TO GIVE IT.

Petitioners begin by seeking to impress the Court, declaring that this case is "uniquely different" because "dozens of lives stand immediately at stake". (Petition at 5.) That statement is both wrong and offensive in its implications. It is wrong because, although this is concededly a class action, every capital case this Court deals with potentially affects dozens of lives; regardless of whether one petitioner or several are involved in the case actually heard by the Court, the ramifications necessarily are nation-wide, so this case is not really unique at all. Moreover, while any action (or refusal to act) by this Court is obviously an important step in the proceedings, lives do <u>not</u> "stand immediately at stake, abiding only the ruling of this Court". (Petition at 5.) A denial of certiorari will not be the cue for immediate mass executions; for example, both the District Court and the Court of Appeals specifically refused to rule on the speedy sentencing issues because of the need for individual adjudication of such claims. (Petition at

18a and 51a-52a.) Moreover, most if not all members of the class have yet to seek whatever habeas corpus relief may be available to them because of claims arising from their individual cases. Hence, a denial of this petition will not propel anyone directly into the gas chamber.

Petitioners' statements are offensive because they imply that merely parading a body count before the Court somehow imparts merits to their claims. This Court has previously indicated that it considers it important any time the state contemplates "taking the life of one of its citizens", Gardner v. Florida, 430 U.S. 349, 358 (1977), so the suggestion that it is necessary to wave multiple bloody shirts to get the Court's attention is totally unwarranted. On the other hand, this Court's workload is already so overwhelming that it must choose its cases carefully, and ought not be stampeded into decisions by such blatant emotional appeals. As the Court well knows, even death penalty cases can be and often are frivolous from the point of view of legal merits.

II. THE USE IN STATE V. WATSON OF THE TERM "SEVER" TO CHARACTERIZE THE ARIZONA SUPREME COURT'S REINTERPRETATION OF THE DEATH PENALTY STATUTE DOES NOT CONFLICT WITH THE FEDERAL COURTS' UNDERSTANDING OF WHAT THE ARIZONA COURT HAD DONE, SO IT CANNOT BE SAID THAT THE FEDERAL COURTS FAILED TO ACCEDE TO THE STATE COURT'S INTERPRETATION OF THE STATE STATUTE.

Petitioners' second "reason" for granting the writ is an effort to conjure up a phantom constitutional problem out of nothing more than inartful word choice by the Arizona Supreme Court. Former Ariz. Rev. Stat. Ann. §13-454(F), the list of mitigating factors to be considered in determining whether the death penalty should be imposed, simply stated: "Mitigating circumstances shall be the following..." This is neutral, somewhat ambiguous language, which with equal logic can be construed to mean either that the list is exclusive, and that other mitigating circumstances may not be considered, or that the list is the minimum group of variables which the sentencing court must consider, and that additional, unlisted mitigating circumstances may also be considered. The Arizona Supreme Court originally adopted the first, limited interpretation, in State v. Richmond, 114 Ariz. 186, 560 P.2d 41

(1976), cert. denied 433 U.S. 915 (1977). However, after this Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978), that such a limitation on mitigating circumstances is not constitutionally acceptable, the Arizona Supreme Court reassessed the statute, in State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied 440 U.S. 924 (1979), which is reproduced as Appendix C (53a-74a) of the Petition. Watson determined that, "had the legislature been aware of the unconstitutionality of the limitation on mitigating circumstances, they would have enacted the remainder of the statute without what is now the offending portion", so the limitation on mitigation was held to be "severable". (120 Ariz. at 444-445, 586 P.2d at 1256-1257.) This holding as to "severability" was reaffirmed in the supplemental opinion issued in response to a motion for rehearing. (120 Ariz. at 451-454, 586 P.2d at 1263-1266.)

The difficulty with the word "severable" is that the Arizona Supreme Court did not actually excise any words from the statute; all that was changed was the interpretation of the aforementioned ambiguous

language in §13-454(F), so that the list of mitigating factors would no longer be deemed to be exclusive. It is on this slender semantic thread that petitioners' argument hangs. Petitioners seem to concede that if the Arizona Supreme Court had simply characterized its action as a reinterpretation of the statute, that would have been unobjectionable. However, because the word "severable" is used, they claim that "The Watson court... proceeded to promulgate a new subsection (F) of the court's own making, rewriting the statute in an attempt to conform to Lockett." (Petition at 5.) This is far-fetched; this Court will no more find anything added to the wording of the statute by the Watson decision than it will find that any statutory language was excised by that decision. Then petitioners argue that, because the Federal District Court and the Circuit Court of Appeals treated Watson as a reinterpretation of the statute or an overruling of State v. Richmond, those courts have disregarded the Arizona Supreme Court's own view and have placed themselves in conflict with the rule that state courts are the ultimate expositors of their own

laws. (Petition at 5-9.)

Far from contravening the rule of state court primacy in state law interpretation, the lower federal courts have affirmed and upheld that rule, by applying it in a reasonable, common sense fashion and refusing to engage in the verbal snipe-hunting promoted by petitioners. The federal courts below have accepted the Arizona Supreme Court's action completely, regardless of the nomenclature applied to it. (See the Appendices to the Petition at 6a-11a and 33a-42a.) It is petitioners who attempt to overthrow a wholly reasonable interpretation of state law by a state court, in the absence of any "extreme circumstances", and in despite of the carefully considered conclusions of two federal courts. Thus, petitioners impugn Mullaney v. Wilbur, 421 U.S. 684 (1975), as well as colliding with this Court's "two court rule", which counsels extra restraint in granting review of cases where multiple courts below have been uniform in their findings and there is no obvious and exceptional show of error. See Berenyi v. Immigration Director, 385 U.S. 630, 635 (1967); Estelle v. Williams, 425 U.S. 501 (1976) (Douglas,

J., dissenting).

It is therefore plain that this Petition should be rejected, and this Court need not hesitate in doing so because of the superficially impressive array of cases presented in it. (See Petition at 6-9.) Hicks v. Oklahoma, 447 U.S. 343 (1980), actually tends to support the sort of resentencing directed by Watson. In that case this Court held that a defendant, who had been deprived of adequate consideration of his sentence by a jury because of improper instructions, was entitled to be resentenced, even though the sentence already imposed was within the range the jury might still impose. The Watson decision does precisely the same thing -- authorizes resentencing, after an appeal by the defendant, to allow consideration of an improperly excluded, sentence-relevant factor. Whalen v. United States, 445 U.S. 684 (1980), specifically pointed out that the sort of legislative construction there engaged in by this Court was permissible only because federal rather than state law was involved. 445 U.S. at 687-688. Ashton v. Kentucky, 384 U.S. 195 (1966), held that a conviction under a defective statute

could not be saved by a subsequent, limiting construction of the statute, but it has nothing whatever to say about sentencings or what the state could do once the original conviction was reversed. In United States v Jackson, 390 U.S. 570 (1968), this Court refused the government's suggestion that the federal kidnapping death penalty statute be saved, not by interpretation, but by constructing out of whole cloth a novel hearing procedure which had no basis in the statute itself, in the discernible congressional intent, or in other areas of Federal law. That is a far cry from the very limited action, based on reasonably clear legislative intent, undertaken in Watson.

Thus, not one of petitioners' federal cases actually supports their position, and the same is true of their state cases. The six state court decisions listed in the Petition at page 7 as refusing to engage in reinterpretation of their respective death penalty statutes are distinguishable in that all of them involved mandatory capital punishment. When that approach was held by this Court to be unconstitutional, the whole essence of

those statutes was gone, so there was virtually nothing left to "reinterpret". That, of course, is very different from the situation here, where Arizona had a fundamentally sound statute, which gave guided discretion to the decision maker, but had simply been too narrow in its guidelines. This distinction was explicitly recognized in one of petitioners' own cases, State v. Lundquist, 99 Idaho 766, 589 P.2d 101, 104-105, n.1 (1979).

Petitioners' Arizona cases are equally useless. It is certainly true (Petition at 7) that the Arizona courts insist on interpreting the actual language of prior opinions, not informal expressions of intent, but that really has nothing to do with the issues here. The Arizona Supreme Court has repeatedly demonstrated its willingness to reinterpret and overrule its prior decisions, even those of substantial age, if cogent reasons for doing so are demonstrated. See, e.g., State v. Harvill, 106 Ariz. 386, 476 P.2d 841 (1970); Prudential Insurance Company of America v. O'Grady, 97 Ariz. 9, 396 P.2d 246 (1964); State v. Allred, 67 Ariz. 320, 195 P.2d 163 (1948); Crane Company v. Arizona State Tax

Commission, 63 Ariz. 426, 163 P.2d 656 (1945). Thus, there was no peculiarity or subterfuge present in that court's action in Watson. Moreover, that the Arizona Supreme Court persisted in its use of the unfortunate term "severance" for its action in Watson (Petition at 8-9) does not prove that it believed that it had actually excised §13-454(F) from the statute books. Far more persuasive is the fact that it has continued to cite to and even quote from that subsection in post-Watson cases. See, e.g., State v. Jordan, 126 Ariz. 283, 290, 614 P.2d 825, 832 (1980), cert. denied 449 U.S. 986; State v. Steelman, 126 Ariz. 19, 27, 612 P.2d 475, 483 (1980), cert. denied 449 U.S. 913; State v. Brookover, 124 Ariz. 38, 41, 601 P.2d 1322, 1325 (1979).

III. THE RESENTENCING OF PETITIONERS VIOLATES NEITHER THE DOUBLE JEOPARDY CLAUSE NOR THE EX POST FACTO CLAUSE.

Petitioners next assert that resentencing them offends the Double Jeopardy Clause, claiming that "once the Arizona statute was declared unconstitutional the sentences of the class members automatically became life imprisonment". (Petition at 9.) If this were true, a new death sentence would

be an increase in penalty, and an obvious double jeopardy violation, but it is not true. The Arizona Supreme Court dealt with this question directly:

> Defendant finally points to Chapter 138, Laws of 1973, Section 10. This provision is not contained in the bound volumes of the Arizona Revised Statutes. It is, however, a part of the legislation passed in 1973. The provision reads:
>
> "In the event the death penalty is held to be unconstitutional on final appeal, a person convicted of first degree murder or another offense punishable by death who has been sentenced to die shall be resentenced by the sentencing court to life imprisonment without possibility of parole until the person has served a minimum of twenty-five calendar years." Sec. 10, Ch. 138, Laws 1973.
>
> Defendant contends that since we have found the death penalty unconstitutional, we therefore must sentence the defendant to twenty-five years. We do not agree.
>
> We did not find the death penalty to be unconstitutional. We held only that in determining the death penalty there are certain factors which, if presented by the defendant, the court must consider. The statute, as severed, is valid.
>
> * * *
>
> [D]efendant cites several cases, two from California, People v. Harvey, 76 Cal.App.3d 441, 142 Cal.Rptr. 887 (1978) and People v. Payne, 75 Cal.App.3d 601, 142 Cal.Rptr. 320 (1977), as well as the South Carolina case of State v. Rodgers, 242 S.E.2d 215 (S.C. 1978) in support of his position. All three

> of these cases are distinguishable. In each of those cases, the defendants, after having been sentenced to death, had their sentences reduced to life imprisonment. After they had commenced to serve the life sentences, the state sought to have them resentenced under legislation enacted after the crime and the reversal. Thus, after the life sentences were at least partially served, the state attempted to subject them to another different and higher punishment. The California court said in Harvey, supra, that when a new death penalty statute was enacted in August of 1977 and the state sought to have the case returned to the trial court for resentencing under the valid 1977 statute, it was double jeopardy. We agree with the California court, but these cases are clearly distinguishable and do not apply to the case at bar. The defendant in the instant case never served his sentence (of death). His death sentence was not reduced to life imprisonment but was merely set aside pending resentencing. We find no violation of the double jeopardy clause in the instant case. See also North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).
>
> State v. Watson, supra, 120 Ariz. at 453, 586 P.2d at 1265.

The state court being the ultimate expositor of the intent and operation of state law under Mullaney v. Wilbur, supra, this Court must accept the conclusions that the whole statute was not declared unconstitutional, that the savings clause was not triggered, and that the class members never received any life sentences. This being so, there was no

added punishment in resentencing them to death and no double jeopardy problem. The language petitioners cite from Dobbert v. Florida, 432 U.S. 282, 301 (1977), does not alter that outcome. The language actually comes from a discussion of an equal protection claim, not a double jeopardy question. Moreover, the Court upheld the Florida Supreme Court's line-drawing with regard to who would or would not be resentenced under a new statute on the basis that it was done on a rational basis. 432 U.S. at 301. The actions of the Arizona Supreme Court are also, clearly, a rational response to the problems posed by this Court's decision in Lockett v. Ohio. Therefore, to the extent that Dobbert relates to this point at all, it supports the Watson decision and militates against granting the writ.

Petitioners also cite as a "separate and distinct double jeopardy violation" (Petition at 9) the fact that no member of the class was a party to the litigation in which their original death sentences were vacated. This argument must be rejected for a number of reasons: First, it is plainly false. Spencer Watson is listed on page i of the Petition as

a member of the class. While his personal claim has since been mooted by a resentencing to life imprisonment (129 Ariz. 60, 628 P.2d 943), the fact remains that a member of the class was indeed a party to the litigation. Second, this issue sounds like a collateral estoppel question, not anything related to double jeopardy. Third, the issue is not properly before the Court. Insofar as counsel for respondent can determine, the only time the matter has ever been raised before is in the Memorandum by amici in support of the Motion for Rehearing in the Ninth Circuit. It is improper to raise wholly new issues in a motion for rehearing. See, e.g., Mitchell v. Greenough, 100 F.2d 1006 (9th Cir. 1939), and cases cited therein. It is similarly inappropriate for an amicus to inject into the case a completely new claim which the party supported has not seen fit to raise. The matter not having been brought properly to the attention of the courts below, and not having arisen out of intervening legislation or decision, it is not properly before this Court and must be disregarded.

Finally, with regard to petitioners' analogy to the state being precluded from taking a "second

swipe" at the class members (Petition at 10), it should be noted that the state did not "miss on the first swing". On the contrary, the state "connected" on the first swing, and each class member was sentenced to death, but Lockett raised a question about whether the "hit" was fairly come by. Therefore, petitioners have been given a "second chance for life" (cf. Dobbert v. Florida, 432 U.S. at 296) which they could not have expected. That is double opportunity, not double jeopardy.

Petitioners also raise an Ex Post Facto Clause claim, relying on language from Dobbert v. Florida, supra. (Petition at 10.) However, as previously noted, that language is actually addressed to an Equal Protection claim, so it is of dubious applicability in any other context. To the extent that the so-called "bulk of the lower court case law and the better reasoned constitutional and common law analysis" relies on this tangential verbiage, it is clearly wrong. Far more germane is the explicit holding of Dobbert that alterations in practice which are procedural and ameliorative cannot, by definition, constitute violations of the Ex Post

Facto Clause. That, of course, is what happened here. Pursuant to Watson no new or different penalty can be imposed, and petitioners have not only a second opportunity to persuade the sentencer that they should be given life, the range of evidence they may present has also been expanded to the horizons of relevance. That offends neither the Double Jeopardy Clause nor the Ex Post Facto Clause.

IV. BULLINGTON v. MISSOURI IS OF SUCH QUESTIONABLE VALIDITY THAT IT SHOULD NOT BE APPLIED AT ALL, BUT EVEN IF BULLINGTON IS RETAINED, IT IS DISTINGUISHABLE FROM THE PRESENT CASE IN SO MANY WAYS THAT ITS REASONING PROVIDES NO JUSTIFICATION FOR GRANTING THE WRIT, ESPECIALLY SINCE ANY DECISION WOULD PROBABLY BE ONLY ADVISORY AND WOULD RESOLVE NO ACTUAL CASE OR CONTROVERSY.

Finally, petitioners argue that there exists the potential for a Double Jeopardy Clause violation under Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852 (1981), if when they are resentenced they again receive the death penalty and that penalty is based upon aggravating circumstances not found when they first were sentenced to death. Merely to state the issue is to demonstrate that it is a matter not congenial to resolution in the present proceedings. It hardly seems reasonable that a prosecutor who

actively seeks the death penalty for a defendant will hold back anything relevant to aggravating circumstances, so the likelihood of new aggravating circumstances being alleged, proved, and relied on seems to be small. Moreover, since there are now no restrictions on what may be introduced by way of mitigation, the probability that some petitioners will be sentenced to life on resentencing is substantial. See, e.g., State v. Watson, 129 Ariz. 60, 628 P.2d 943 (1981). Hence, any ruling by this Court may well turn out to be purely advisory. While the Petition at page 11 points to an instance in which a class member was resentenced to death and there was a finding of new aggravating circumstances, it is worthy of note that in that case the Arizona Supreme Court affirmed the death sentence without relying on the newly-found aggravating factors. State v. Jordan, 126 Ariz. 283, 614 P.2d 825 (1980), cert. denied 449 U.S. 986 (1981). Another class member discussed by both the federal District Court Judge and by Judge Adams in his Ninth Circuit dissent, whose resentencing to death relied at least in part on newly-found aggravation, has finally been

given a life term. See State v. Valencia, ___ Ariz. ___, 645 P.2d 239 (1982). In 19 resentencings pursuant to Watson, there have been only 3 cases in which new aggravating factors have been found by the sentencer, and in none of those has the Arizona Supreme Court relied on the newly-found aggravation.[1] Should it ever decide to do so, this Court can take up an actual case and controversy and resolve the issue with precision, but to grant the writ to examine the question in the context of this case would seem to violate this Court's long-standing rule of refusing to deal with Constitutional issues where it is not really necessary to do so.

Should the Court be tempted to grant the writ, despite the fact that any opinion it issues on this question would probably be of nothing more than academic interest, certain other factors should be considered. Petitioners are seeking to expand the

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[1] State v. Jordan and State v. Valencia have already been discussed. State v. Blazak, 114 Ariz. 199, 560 P.2d 54 (1977), and 131 Ariz. 598, 643 P.2d 694 (1982), resembles Jordan in that, although one additional aggravating circumstance was found, it was really superfluous because there were already several aggravating circumstances and no mitigating circumstances.

applicability of Bullington v. Missouri beyond its rather limited facts. That is no good reason for granting their petition because there exist substantial doubts as to whether Bullington itself was rightly decided. Justice Powell's dissenting opinion makes very clear that Bullington is a totally unwarranted departure from the previous decisions of this Court. By wandering away from the clear teaching and predictable standard of cases such as North Carolina v. Pearce, 395 U.S. 711 (1969), and United States v. DiFrancesco, 449 U.S. ___, 101 S.Ct. 426 (1980), that the implied acquittal doctrine does not apply to sentencing situations, the Court in Bullington propelled itself into a morass of distinctions without substantive differences, much as it did in the Fourth Amendment context in Robbins v. California, 453 U.S. 420 (1981). The only reason this Court should grant review of a Bullington-based petition is to overrule Bullington, as Robbins was eliminated in United States v. Ross, ___ U.S. ___, 102 S.Ct. 2157 (1982), not to extend Bullington.

Even if Bullington is allowed to stand there are very substantial differences between it and this

case, which militate against granting the petition. To begin with, Bullington explicitly limited itself to jury sentencing situations:

> The issue in the present case is whether the reasoning of Stroud is also to apply under a system where a jury's sentencing decision is made at a bifurcated proceeding's second stage at which the prosecution has the burden of proving certain elements beyond a reasonable doubt before the death penalty may be imposed.
>
> 101 S.Ct. at 1854 (emphasis added).

Former Ariz. Rev. Stat. Ann. §13-454, under which all members of the class were sentenced and would be resentenced, provided for sentencing to be done by the judge, not a jury. This has been held to be a significant factor in determining that Bullington did not apply so as to preclude a resentencing to death under Montana's capital punishment statute. See Fitzpatrick v. State, 638 P.2d 1002, 1016-1017 (Mont. 1981). Second, Bullington placed great weight on the similarities between a Missouri trial on the merits and the nature of the presentencing hearing; so great are the similarities that the hearing is spoken of by the Missouri statute itself as being simply a resumption of the trial, and all the usual trappings

of trial (jury argument, instructions, etc.) are required. 101 S.Ct. at 1855, n.4, and 1858, n.10. The great differences between this statute and the non-trial-like Arizona procedure were a major factor in the Ninth Circuit's rejection of petitioners' Bullington claim. (See Petition at 17a.) The same sort of procedural distinctions also figured largely in State v. Fitzpatrick, supra.

Third, this Court in Bullington was concerned about the prosecution having "the opportunity to convince a second factfinder of its view of the facts"; indeed, this was the main basis on which Bullington was found to differ from United States v. DiFrancesco, supra. (See 101 S.Ct. at 1859.) However, there is only one factfinder involved in sentencings or resentencings in Arizona capital cases. Barring some form of legal or actual incapacity, the same judge who originally sentenced each petitioner does the resentencing as well. Ariz. Rev. Stat. Ann. §13-703(B), as amended by 1982 Ariz. Sess. Laws ch. 238, §2.

Fourth, and far more important even than the preceding distinctions, is the fact that every one of

the class members (unlike Robert Bullington) had already been sentenced to death. To resentence them to death, even relying on new aggravating factors, in no way imposes a different or harsher penalty than had already been assessed against them; it is not obtaining something which the sentencer had refused to give the first time. The importance of this fact is indicated by this Court's reliance in Bullington on Green v. United States, 355 U.S. 184 (1957), and Bullington's recognition of the continued viability of Stroud v. United States, 251 U.S. 15 (1919). (See 101 S.Ct. at 1854, 1858-1859.) The essence of Bullington is an application of the implied acquittal doctrine discussed in Green. Green held that it violated the Double Jeopardy Clause to retry a defendant for first degree murder when a jury failed to act on a first degree charge but convicted of second degree murder, because the conviction of the lesser offense was an implied acquittal of the greater offense. However, Green specifically distinguished itself from Stroud, on the grounds that "In that case a defendant was retried for first degree murder after he had successfully asked an

appellate court to set aside a prior conviction for that same offense." 355 U.S. at 195, n.15 (emphasis added). The clear implication is that the implied acquittal doctrine applies only to the extent that the government seeks to "up the ante" in the renewed proceedings, the prosecution is not barred by the Double Jeopardy Clause from proceeding with a new trial on a charge no greater than the one on which the defendant was originally convicted. This being so, there is likewise no Double Jeopardy bar to obtaining a second sentence which is no greater than that originally imposed -- life in Bullington, and death in petitioners' cases. Such was the conclusion of the Ninth Circuit in this case (see Petition at 17a) and of the state court in Hopkinson v. State, 632 P.2d 79, 172, n.46 (Wyo. 1981), cert. denied ___ U.S. ___, as well as of a line of Georgia cases. See Godfrey v. State, 248 Ga. 616, 284 S.E.2d 422 (1981); Zant v. Redd, 249 Ga. 211, 290 S.E.2d 36 (1982); and Patrick v. State, 249 Ga. 293 S.E.2d 329 (1982).

Yet another important distinciton brought out in the Georgia cases is the precise nature of an aggravating circumstance, which is radically

different from either an offense (such as was considered in Green v. United States) or a penalty (the subject of Bullington). Analyzing the Bullington decision, the Georgia Supreme Court stated:

> The court essentially equated the question of life or death to an offense and found that a decision of life or death deserved the same finality as a decision on guilt or innocence. It noted that the defendant faces "'anxiety and insecurity'" when facing the death penalty.
>
> We refrain from equating "aggravating circumstances" to an offense. See, Redd v. State, 242 Ga. 876, 885, 252 S.E.2d 383 (1979); Green v. State, 246 GA. 598(8), 272 S.E.2d 475 (1980).
>
> Aggravating circumstances are procedural standards designed to control a jury's discretion in capital cases in order to ensure against capricious and arbitrary enforcement of the death penalty. See, Gregg v. Georgia, 428 U.S. 153, 197-98 (1975) 96 S.Ct. 2909, 2936, 49 L.Ed.2d 859 (1975), reh. den., 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976). Aggravating circumstances are not substantive "penalties" or "offenses"; they do not place the defendant's life in peril or subject him to a possible "conviction"; they are standards which guide a jury's decision on what does place the defendant's life in jeopardy at the sentencing trial -- the death penalty.
>
> As we have determined that double jeopardy does not apply to aggravating circumstances, we apply the established double jeopardy rule to the sentencing phase of Redd's trial, i.e., that on a trial on guilt or innocence, if a defendant is

> found guilty and convicted but overturns his conviction on legal grounds, the slate is wiped clean, the conviction nullified, and the state and the defense start anew. Godfrey v. State, 248, Ga. 616(1), 284 S.E.2d 422 (1981); North Carolina v. Pearce, 395 U.S 711, 720-21, 89 S.Ct. 2072, 2078, 23 L.Ed.2d 656 (1969); United States v. Tateo, 377 U.S. 463, 466, 84 S.Ct. 1587, 1589, 12 L.Ed.2d 448 (1963).
>
> Zant v. Redd, supra, 290 S.E.2d at 38-39.

Based on this reasoning, there is no reason why the prosecution should be barred from presenting aggravating circumstances not found during the original sentencing.

Finally, it is important to note the clear distinctions that exist between Bullington and the present case with regard to the type of errors which are involved. In Bullington the error which caused the retrial and thereby gave birth to the resentencing problem was a matter of jury selection; the procedural integrity of the original sentencing procedure was never impugned. Further, the critical point in the Double Jeopardy analysis was the conclusion that there had been an implied acquittal, i.e., an apparent finding of insufficient evidence to support a death sentence. The very opposite is true

here: the original error went directly to the heart of the sentencing process (in the integrity of which the state also has an abiding interest), but was not a question of sufficiency of evidence, because all members of the class actually were sentenced to death. Such a situation clearly invokes Burks v. United States, 437 U.S. 1, 15 (1978):

> Various rationales have been advanced to support the policy of allowing retrial to correct trial error, but in our view the most reasonable justification is that advanced by Tateo, supra, 377 U.S., at 466, 84 S.Ct., at 1589:
>
> > "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction."
>
> See Wilson, supra, 420 U.S., at 343-344, n.11, 95 S.Ct., at 1021-1022; Wade v. Hunter, 336 U.S. 684, 688-689, 69 S.Ct. 834, 836-837, 93 L.Ed. 974 (1949). In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implied nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial

> misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished. (Emphasis added.)

Imposition of the death penalty in Arizona can result only from a comparison of the aggravating and mitigating circumstances; error as to either one necessarily implicates the integrity of the whole process. To allow introduction pursuant to Lockett of unlimited mitigation at resentencing while precluding admission of relevant evidence of aggravating circumstances inescapably distorts that joint weighing process and grievously abuses the concept of individualized sentencing which underlies Lockett; presumably the intent is to have everything relevant, bad as well as good, fairly presented to the sentencer. That is all that Watson calls for — a full and fair presentation, in one hearing, of both sides. Inasmuch as that harmonizes with this Court's sentencing ideals, it presents no Constitutional error, and needs no correction by this Court. The petition should therefore be denied.

CONCLUSION

In repeated hearings and rehearings every one of petitioners' claims has been rejected by the Arizona Supreme Court, the Federal District Court, and the Ninth Circuit Court of Appeals. Those claims have no more validity now than they did when presented to each of these other tribunals, and do not warrant application of any of this Court's limited resources. The petition should be denied.

DATED this 27th day of October, 1982.

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